Supreme Court, U.S.
FILED
99 604 OCT - 6 1999
OFFICE OF THE CLERK

No. 99-

IN THE

Supreme Court of the United States

CARMEN VELAZQUEZ, *et al.*,

Petitioners,

v.

LEGAL SERVICES CORPORATION and
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BURT NEUBORNE
Counsel of Record
E. JOSHUA ROSENKRANZ
DAVID S. UDELL
DEBORAH GOLDBERG
KIMANI PAUL-EMILE
PHILIP G. GALLAGHER
PAUL K. SONN
Brennan Center for Justice
at NYU School of Law
161 Avenue of the Americas
Fifth Floor
New York, New York 10013
(212) 998-6730

PETER M. FISHBEIN
PAUL C. LLEWELLYN
ALAN ROTHMAN
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER, LLP
425 Park Avenue
New York, New York 10022
(212) 836-8000

Attorneys for Petitioners

Dated: October 6, 1999

QUESTIONS PRESENTED

1. Whether onerous restrictions imposed by Congress barring federally funded legal services lawyers from providing effective representation to many of their indigent clients constitute content- and viewpoint-based discrimination, and interfere with the attorney-client relationship, in violation of the free speech and free association protections of the First Amendment?

2. Whether the government imposes an unconstitutional condition on the receipt of federal funds in violation of the First Amendment when it prohibits legal services lawyers from using even private donations or local-government funds to finance the costs of First Amendment-protected lawyering activities that they are prohibited from performing with federal funds, unless they establish and maintain an immensely wasteful, physically separate organization?

3. Whether the Legal Services Corporation, a federally chartered nonprofit corporation, was authorized to rewrite an unconstitutional congressional statute that barred recipients of federal funds from using even private and local-government funds to support certain lawyering activities, converting it instead into a statute that allows them to do so through physically separate affiliates?

PARTIES TO THE PROCEEDING

Three sets of litigants were party to this case in the courts below: the plaintiffs; the defendant Legal Services Corporation; and the intervenor-defendant United States. The plaintiffs consist of the following persons and not-for-profit corporations: Carmen Velazquez, Elisabeth Benjamin, Andrew J. Connick, Peggy Earisman, C. Virginia Fields, Guillermo Linares, Stanley Michels, Adam Clayton Powell, IV, Lawrence Seabrook, Lauren Shapiro, Olive Karen Stamm, Scott M. Stringer, Jeanette Zelhof, Centro Independiente de Trabajadores Agricolas, Inc., Community Service Society of New York, Inc., Farmworkers Legal Services of New York, Inc., Greater New York Labor-Religion Coalition, New York City Coalition to End Lead Poisoning, and WEP Workers Together. All of the aforementioned plaintiffs seek review of the judgment below. Two former plaintiffs, Lucy A. Billings and Jill Ann Boskey, are no longer parties to the proceedings.

RULE 29.6 LISTING

None of the corporate filers has any parent companies or non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Rule 29.6 Listing	ii
Table of Contents	iii
Table of Cited Authorities	vi
Table of Appendices	x
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provisions, Statutes, and Regulations Involved	2
Statement of the Case	3
A. The Legal Services Corporation and the 1996 Restrictions on Legal Services Lawyers	3
B. LSC's Administrative Implementation of the Restrictions and the Litigation Challenging It	6
C. The Proceedings Below	8
D. Plaintiffs' Legal Claims	11

Contents

Page

Reasons for Granting the Writ 14

I. This Court Should Grant Review in Order to Resolve Pervasive Confusion in the Lower Courts and Among Policymaking Officials Over the Scope of the Government's Power to Restrict First Amendment-Related Activity as a Condition of Providing Government Aid. 14

A. This Court Has Not Resolved Whether the Relationship Between a Government-Funded Lawyer and an Indigent Client Enjoys First Amendment Protection from Intrusive Conditions on the Receipt of Government Subsidies Similar to the Protection Enjoyed by a Government-Funded University Teacher and Student. 17

B. This Court Has Not Resolved the Circumstances Under Which Restrictions on the First Amendment Activities of Government-Funded Lawyers for the Poor Constitute Forbidden Viewpoint-Based Discrimination. 21

Contents

Page

C. This Court Has Not Resolved Whether Onerous Restrictions on the Use of Private Donations and Local-Government Funds, Such as an Unnecessary Requirement of Physical Separation Between Government-Subsidized and Non-Subsidized Speech Activities, Are an Unconstitutional Condition in Violation of the First Amendment. 24

II. This Court Should Grant Review to Consider Whether Federally Chartered Nonprofit Corporations, Such as LSC, Are Entitled to *Chevron* Deference When They Issue Interpretive Regulations That Contravene the Express Language of the Congressional Statute. 27

III. This Court Should Grant Review Because the Constitutionality of the 1996 Legal Services Restrictions Is of Great National Significance, the Decision Below is Erroneous, and this Petition May Be the Court's Only Opportunity to Resolve These Issues Because Congress Has Statutorily Barred Legal Services Programs and Attorneys from Bringing Future Litigation Against LSC. 28

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) 14, 26

Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) 27, 28

FCC v. League of Women Voters, 468 U.S. 364 (1984) 16, 24, 25, 26, 27

Finley v. National Endowment for the Arts, 118 S. Ct. 2168 (1998) 15, 19, 21

Griffin v. Illinois, 351 U.S. 12 (1956) 23

In re Disability Law Center of N.H., 130 N.H. 328, 541 A.2d 208 (1988) 18

In re Primus, 436 U.S. 412 (1978) 12, 18

Keyishian v. University of the State of N.Y., 385 U.S. 589 (1967) 16, 17

Legal Aid Soc'y of Hawaii v. Legal Services Corp., 961 F. Supp. 1402, *vacated*, 981 F. Supp. 1288 (D. Haw. 1997), *aff'd in part & rev'd in part*, 145 F.3d 1017 (9th Cir.), *cert. denied*, 119 S. Ct. 539 (1998) 6

Cited Authorities

Page

Legal Aid Soc'y of Hawaii v. Legal Services Corp., 145 F.3d 1017 (9th cir.), *cert. denied*, 119 S. Ct. 539 (1998) 11

NAACP v. Button, 371 U.S. 415 (1963) 12, 18

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 14, 26

Regan v. Taxation With Representation, 461 U.S. 540 (1983) 25

Regional Management Corp. v. Legal Services Corp., 186 F.3d 457, 1999 WL 547925 (4th Cir. July 28, 1999) 28

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995) ..... *passim*

Rust v. Sullivan, 500 U.S. 173 (1991) ..... *passim*

Spokane County Legal Services v. Legal Services Corp., 614 F.2d 662 (9th Cir. 1980) 28

Texas Rural Legal Aid v. Legal Services Corp., 940 F.2d 685 (D.C. Cir. 1991) 28

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) 26

Cited Authorities

Page

United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) 18

United States v. Eichman, 496 U.S. 310 (1990) 13, 24

United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971) 18

Varshavsky v. Perales, No. 40767/91, slip op. (Sup. Ct. N.Y. County Dec. 24, 1996) 6, 13, 22

Velazquez v. Legal Services Corp., 164 F.3d 757 (2d Cir. 1999) ..... *passim*

Velazquez v. Legal Services Corp., 985 F. Supp. 323 (E.D.N.Y. 1997) ..... *passim*

Statute:

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1988 5

42 U.S.C. § 2996 20

United States Constitution:

First Amendment ..... *passim*

Cited Authorities

Page

Other Authorities:

Pub. L. No. 93-355, § 1001, 88 Stat. 378 (1974) 20

Pub. L. No. 104-134, § 504, 110 Stat. 1321, 1321-50 through 1321-59 (1996) 4, 6, 8

Pub. L. No. 104-208, § 502, 110 Stat. 3009, 3009-59 through 3009-60 (1996) 4, 8

Pub. L. No. 105-119, § 502, 111 Stat. 2440, 2510 (1997) 4

Pub. L. No. 105-119, § 504(c)(5), 111 Stat. 2440, 2512 (1997) 4, 5, 11, 30

Pub. L. No. 105-277, § 411, 112 Stat. 2681, 2681-107 (1998) 4

S. Rep. No. 104-392 (1996) 6

62 Fed. Reg. 27,695, 27,697-27,698 *codified in part* at 45 C.F.R. Part § 1610.8 7

William Glaberson, *Hazy Legal Terrain: Museum Fight Pits Free Expression Against Control of Public Spending*, N.Y. TIMES, Sept. 30, 1999 15

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Second Circuit Dated And Decided January 7, 1999 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The Eastern District Of New York Dated December 22, 1997 ..... 53a

Appendix C — Opinion Of The United States Court Of Appeals For The Second Circuit Denying Petition For Rehearing Dated And Filed July 8, 1999 ..... 104a

Appendix D — Constitutional Provision Involved 106a

Appendix E — Statutes And Regulations Involved 107a

PETITION FOR WRIT OF CERTIORARI

Plaintiff-petitioners Carmen Velazquez, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, filed January 7, 1999, affirming in part and reversing in part the decision of the District Court denying plaintiffs' motion for a preliminary injunction, is reported at *Velazquez v. Legal Services Corp.*, 164 F.3d 757 (2d Cir. 1999). The Court of Appeals' order, dated July 8, 1999, denying a petition for rehearing and suggestion of rehearing *en banc* filed by plaintiffs, and denying petitions for rehearing filed by defendant the Legal Services Corporation and defendant-intervenor the United States, is unreported. The opinion of the District Court, dated December 22, 1997, denying plaintiffs' motion for a preliminary injunction is reported at *Velazquez v. Legal Services Corp.*, 985 F. Supp. 323 (E.D.N.Y. 1997). These orders and opinions are reproduced in the Appendix (hereinafter "App.") to this Petition for Writ of Certiorari as Appendices A, B, and C, found at pages 1a-105a.

STATEMENT OF JURISDICTION

The Second Circuit entered its judgment on January 7, 1999. Plaintiffs timely filed a petition for rehearing and suggestion of rehearing *en banc* on February 22, 1999, which the Court of Appeals denied in an order filed on July 8, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The following constitutional provisions, statutes, and regulations, set forth in Appendices D and E, are involved in this case:

1. United States Constitution, Amendment I (App.106a);

2. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-50 through 1321-59 (App. 107a-130a);

3. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-59 through 3009-60 (App. 131a-135a);

4. Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2510-2512 (App. 136a-143a);

5. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-107 (App. 144a-145a); and

6. Legal Services Corporation, "Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity," 62 Fed. Reg 27,695-27,700 (May 21, 1997), codified in part at 45 C.F.R. Part 1610 (App. 146a-172a).

STATEMENT OF THE CASE

A. The Legal Services Corporation and the 1996 Restrictions on Legal Services Lawyers

For more than twenty-five years, Congress, in a three-way partnership with state and local governments and private donors, has helped to finance a legal safety net providing the poorest of Americans with effective civil legal representation. The key to the success of that partnership has been the Legal Services Corporation ("LSC"), a nonprofit corporation established by Congress in 1974 to transmit federal funds to hundreds of local organizations providing civil legal representation to the poor.

In choosing to constitute LSC as an independent, nonprofit corporation, Congress consciously declined to create a nationwide bureaucracy under federal executive control, on the model of United States Attorneys' offices. By routing funds for civil legal services to the poor through an independent corporation to a myriad of autonomous, community-based entities, Congress hoped to encourage operational independence, local initiative, and supplemental non-federal funding.

This petition arises out of an undisguised effort by Congress – abandoning that partnership – to disable local recipients of LSC funds from providing a full range of legal services to the poor, even when the forbidden services are needed to provide effective representation to an indigent client, and even when the activities are not funded by LSC at all.

In the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (the "1996 Restrictions"), Congress imposed extensive and onerous limitations on the ability of lawyers employed by local offices receiving funding

from LSC to provide legal services to the poor. Chief among them were a range of lawyering restrictions barring federally funded lawyers for the poor from employing certain basic arguments, procedural devices, and other advocacy tools when representing their indigent clients. For example, Congress forbade such legal services attorneys from advancing certain classic substantive legal arguments, such as challenges to the constitutionality of welfare statutes or to the statutory validity of welfare regulations. Similarly, Congress proscribed the use of certain generally available procedural devices by such lawyers, barring legal services attorneys from employing the class-action mechanism; prohibiting them from invoking fee-shifting statutes; forbidding them from communicating with policymaking officials; banning legal advocacy directed to administrative rule-making bodies, or legal advocacy directed to legislatures (pejoratively called "lobbying" by Congress); and precluding the use of public education to supplement litigation advocacy. *See* Pub. L. No. 104-134, §§ 504(a)(2)-(4), (7), (13), (16), 110 Stat. 1321,1321-53 through 1321-56 (1996), App. 114a, 120a, 121a.[1] Denial of these important litigation

---

[1] Congress also expanded a politically inspired laundry list of disfavored substantive constitutional rights, forbidding federally funded lawyers for the poor from seeking to protect these unpopular rights on behalf of indigent clients. Among these disfavored constitutional rights are the right to one-person one-vote and the right to reproductive freedom. *See* Pub. L. No. 104-134, §§ 504(a)(1), (14), 110 Stat. at 1321-53,1321-55, App. 113a, 120a.

The restrictions were renewed by Congress in the 1997, 1998, and 1999 federal appropriations acts. *See* Pub. L. No. 104-208, § 502(a)(1), 110 Stat. 3009, 3009-59 (1996), App. 133a; Pub. L. No. 105-119, § 502(a)(1), 111 Stat. 2440, 2510 (1997), App. 138a; Pub. L. No. 105-277, § 411, 112 Stat. 2681, 2681-107 (1998), App. 145a. Although there are technical differences among the appropriations bills, none are relevant to this petition except for the addition of a draconian debarment provision in the 1998 bill that automatically cuts off the funding of any legal services lawyer or entity that dares to challenge the restrictions by suing LSC. Pub.

and advocacy tools places low-income legal services clients at a substantial disadvantage as they seek to vindicate their rights.[2]

Instead of permitting private and local funds to fill the gaps left by the newly restricted federal funds, Congress

---

L. No. 105-119, § 504(c)(5), 111 Stat. at 2512, App. 142a.

[2] For example, challenging the constitutionality of welfare law provisions is often the only means of remedying the harm caused to a low-income client by systematically arbitrary or lawless benefits decisions. And in cases where large numbers of poor people have been illegally denied benefits to which they are entitled, the class action device typically affords the only practical means by which those rights will ever be vindicated, since legal services programs generally lack the resources to represent large numbers of persons in individual enforcement actions. Moreover, even where a legal services lawyer seeks chiefly to represent an individual client rather than a group of clients, the class action can still be a critical litigation tool – such as where the client has been individually harmed by a broader pattern and practice of illegal conduct that can be documented only by use of the class action device and corresponding class-wide discovery.

Legal services lawyers' ability to invoke the fee-shifting provisions of 42 U.S.C. § 1988 and other similar statutes equally plays a vital role in enforcing the rights of the poor. Entirely apart from helping finance the representation of indigent clients through fee recoveries, poor plaintiffs' ability to recover attorney's fees under fee-shifting statutes plays a crucial role in inducing defendants to respect the rights of poor persons in the first instance. Government benefits or wages owed poor people, while typically modest in size, constitute critical economic lifelines. However, except in the relatively rare circumstances where punitive damages are available, the threat of liability for make-whole relief or compensatory damages often does not provide government agencies or private parties a strong incentive to honor their obligations to the poor. This is all the more true where lawyers for the poor are forbidden from pursuing class actions. The threat of liability for attorney's fees fills an important gap in this law enforcement regime and provides a real economic incentive for defendants to respect the rights of the poor. Barring legal services lawyers from asserting claims for attorney's fees on behalf of their low-income clients effectively denies the poor this enforcement tool that our legal system makes available to all other litigants.

imposed an across-the-board ban on such so-called "restricted" representational activities, for the first time[3] extending the same restrictions to *all* of a recipient's activities (with minor exceptions not implicated here), even where they are financed solely with private donations or local-government funds. *See id.* § 504(d)(2)(B), 110 Stat. at 1321-56, App. 123a. Indeed, the statute's legislative history stresses that "The legislation prohibits the use of alternative corporations to avoid or evade the provisions of the law." S. Rep. No. 104-392, at 26 (1996).

B. LSC's Administrative Implementation of the Restrictions and the Litigation Challenging It

The 1996 Restrictions – particularly Congress's effort to limit representational activities carried out by legal services attorneys when financed by non-federal funds – precipitated several constitutional challenges, including this one. After two courts had held that Congress had unconstitutionally burdened the use of non-federal funds by flatly banning their use for any of the restricted purposes, *see Varshavsky v. Perales*, No. 40767/91, slip op. (Sup. Ct. N.Y. County Dec. 24, 1996) (holding ban unconstitutional); *Legal Aid Soc'y of Hawaii v. Legal Services Corp.*, 961 F. Supp. 1402 (preliminarily enjoining enforcement of most of congressional restrictions on use of non-federal funds), *vacated*, 981 F. Supp. 1288 (D. Haw. 1997), *aff'd in part & rev'd in part*, 145 F.3d 1017 (9th Cir.), *cert. denied*, 119 S. Ct. 539 (1998), and the District Court in this case had also expressed strong reservations about the constitutionality of Congress's initial formulation, LSC began a process of rewriting the congressional statute on the fly, in the guise of implementing regulations. In place of the flat ban imposed by the statutory text, LSC substituted a regulation

---

[3] Congress's earlier efforts to restrict the use of federal funds by legal services lawyers had permitted gaps in federally funded legal services to be filled by non-LSC funds.

permitting a federally funded legal services office to use private and local funds to provide "restricted" legal services, but only if the disfavored services are delivered in a "physically separate" setting. *See* Legal Services Corporation, "Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity," § 1610.8, 62 Fed. Reg. 27, 695, 27,697-27,698, App. 157a-162a (summarizing revisions to rule).

Under the final LSC regulations, legal services programs may establish separate organizations to provide "restricted" forms of legal representation, but only so long as the LSC recipient organization maintains "objective integrity and independence from any organization that engages in restricted activities." *Id.* § 1610.8(a), App. 170a-171a. The regulations define "objective integrity and independence" as requiring (1) legal separateness; (2) no transfer of LSC funds to, or use of LSC funds to subsidize, the affiliate; and (3) physical and financial separateness. *Id.* The regulations list four relevant but non-exhaustive criteria for judging whether the organizations are physically and financially separate — including the existence of separate personnel, the degree of separation of physical facilities, the extent of restricted activities, and the extent of distinguishing signage — but explicitly retain for LSC the power to make a wholly discretionary judgment "on the totality of the facts" as to whether, in a given case, the affiliate may be treated as an independent entity. *Id.* § 1610.8(a)(3), App.171a. In the only known instance where an LSC-funded recipient has sought to establish a non-restricted activity affiliate that was separate in all respects but physical plant, LSC denied approval on that ground, demonstrating that, in practice, the regulations in fact require full physical separation.[4]

---

[4] On August 12, 1997, pursuant to the "final" regulations, Queens Legal Services submitted an application to LSC for recognition of a separately incorporated legal program that would operate as a parallel,

C. The Proceedings Below

Focusing first on the restrictions as they are applied to activities conducted solely with private donations and local-government funds, the District Court initially expressed concern that Congress's apparent ban on the use of such non-federal funds by federally funded legal services offices violated the First Amendment. Transcript of March 24, 1997 Hearing at 16-17 (Court of Appeals Joint Appendix at 460-61). However, after LSC modified its regulations to permit the use of private donations and local-government funds in a "physically separate" program, the District Court denied plaintiffs' request for preliminary injunctive relief. In upholding the facial constitutionality of the "physically separate" requirement, the District Court explicitly found that physical separation was not necessary to assure that federal funds did not subsidize restricted activities because existing accounting practices could assure that no cross-subsidization took place. *Velazquez v. Legal Services Corp.*, 985 F. Supp. 323, 339 (E.D.N.Y. 1997), App. 89a ("preventing the subsidization of prohibited activities with federal funds . . . [presents] no need to restrict the use of non-LSC funds at all"). Instead, the District Court held that a requirement of "physical separation" was justified solely by the government's interest in preventing public confusion over whether federal funds were being used to subsidize – and, hence, whether the federal government endorsed – the provision of restricted legal services. *Id.* at 341, App. 95a-96a.

---

financially autonomous non-federal unit authorized to use non-federal funds to deliver a full range of legal services to the poor. On September 10, 1997, LSC denied the application because the proposed financially autonomous, parallel corporation was not "physically separate" from the federally funded legal program. Copies of the application of Queens Legal Services, and LSC's rejection letter are contained in the record in the Court of Appeals. *See* Court of Appeals Joint Appendix at 538-44.

In so holding, the District Court rejected plaintiffs' proposed "less restrictive alternative" of signage and full disclosure. *Id.*

The District Court also addressed the broader question of whether Congress's attempt to regulate and limit the lawyering tools and arguments available to federally funded attorneys for the poor unconstitutionally burdens the attorney-client relationship, in violation of the First Amendment. While recognizing that "the restrictions embodied under the Act impact, under the umbrella of the First Amendment, a broad range of rights affecting the pursuit and vindication of legal interests," *id.* at 342, App. 99a, the lower court ultimately concluded that the restrictions were permissible, relying on *Rust v. Sullivan*, 500 U.S. 173 (1991). *See* 985 F. Supp. at 342-44, App. 99a-103a.

A divided panel of the Court of Appeals affirmed in part and reversed in part. Reversing the District Court, the panel majority ruled that the statutory restriction purporting to ban federally funded legal services lawyers from challenging the constitutionality or legality of state or federal welfare provisions violates the First Amendment as construed by this Court in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). *See Velazquez v. Legal Services Corp.*, 164 F.3d 757, 769-73 (2d Cir. 1999), App. 29a-38a. The panel majority reasoned that a restriction on challenging the constitutionality of a welfare provision discriminates on the basis of viewpoint because it permits legal services lawyers to argue in favor of the legal *status quo*, while prohibiting them from arguing against it.

But the panel majority rejected a similar First Amendment challenge to the congressional restrictions on the use of other lawyering tools – such as the ban on communications with policymaking officials and the ban on class actions. The Court of Appeals reasoned that those bans

are viewpoint-neutral within the meaning of *Rosenberger*, despite the fact that only one side in a dispute is subject to the prohibitions, and despite the fact that lawyers for the poor are not likely to appear randomly on either side of an issue. *Velazquez*, 164 F.3d at 768-69, App. 25a-27a.

The panel majority also rejected plaintiffs' argument that the First Amendment strictly limits Congress's power to attach strings to federal funds when Congress elects to fund the establishment of a traditional lawyer-client relationship. *Id.* at 764-65, App. 15a-17a. Plaintiffs argued that Congress may not offer federal funds to create a traditional attorney-client relationship and then interfere with the lawyer's historic obligation to exercise independent, professional judgment on whether to invoke generally available substantive arguments and procedural techniques that would best advance a client's legal rights. The panel majority acknowledged that *dictum* in *Rust v. Sullivan*, 500 U.S. at 200 – in which this Court reviewed the constitutionality of congressional restrictions on family planning counseling services provided by federally funded medical professionals – might support such an argument. 164 F.3d at 764, App. 16a. But the Court of Appeals felt itself bound by the outcome in *Rust* (which upheld the challenged restrictions) to reject its application to this case.

Finally, the panel majority rejected plaintiffs' facial challenge to the LSC requirement that private donations and local-government funds must be funneled through a wasteful "physically separate" program in order to fund "restricted" legal services. Instead, the Court of Appeals remanded the issue for "as applied" consideration by the district courts under a standard that requires each affected legal services program to demonstrate the onerousness of the requirement. *Id.* at 765-67, App. 18a-24a. It will, however, be impossible for any legal services program to seek to litigate the "as applied" validity of the restrictions because Congress, responding to the likely

filing of "as applied" challenges, enacted a "debarment" provision in 1998 that automatically cuts off funding to any program that files such a challenge. *See* Pub. L. No. 105-119, § 504(c)(5), 111 Stat. at 2512, App. 142a.[5]

D. Plaintiffs' Legal Claims

The congressionally imposed restrictions at issue in this case are inherently content- and viewpoint-based. They deny federally funded lawyers for the poor, and their indigent clients, access to classic legal techniques that are often essential to effective legal representation, and that are routinely available to opposing counsel and their clients. Not only are lawyers for the poor prohibited from using these techniques in their federally funded operations, they are barred from using privately donated or locally provided funds to deliver such "restricted" legal services to their indigent clients unless a (chronically underfunded) legal services program establishes a wasteful "physically separate" legal program to deliver the disfavored legal services.

---

[5] Judge Dennis Jacobs dissented from the portion of the decision that invalidated the ban on challenges to the constitutionality and legality of federal and state welfare provisions. Judge Jacobs argued that, under *Rust*, 500 U.S. at 194-95, Congress may define the parameters of any program that it funds without running afoul of the First Amendment. *Velazquez*, 164 F.3d at 773-79, App. 40a-52a (Jacobs, J., concurring in part and dissenting in part).

In *Legal Aid Society of Hawaii (LASH) v. Legal Services Corp.*, 145 F.3d 1017 (9th Cir.), *cert. denied*, 119 S. Ct. 539 (1998), a panel of the Ninth Circuit, speaking through retired Justice White sitting by designation, rejected a narrowly framed constitutional challenge to restrictions on the use of non-federal funds by federally funded legal services offices. The court held that, under *Rust*, the government enjoys broad power to place conditions on the use of federal funds. *LASH* did not consider the constitutionality of efforts to impose content- and viewpoint-discriminatory restrictions on the use of federal funds.

It is true, of course, that, under existing constitutional doctrine, Congress is under no legal obligation to fund a program of civil legal assistance to the poor. But, once Congress chooses to fund lawyers for the poor, it must respect three limits imposed by the First Amendment on its power to use conditions on the receipt of federal funds as a technique for regulating the professional relationship between lawyers for the poor and their indigent clients.

First, when the government funds certain sensitive associational relationships protected by the First Amendment, such as that between a university teacher and a student or, as here, between an attorney and an indigent client, it may not interfere with the relationship, despite the fact that the government is funding the activity. This Court has long held that the First Amendment protects the right of lawyers and clients to associate together to advance clients' legal rights through litigation and other forms of legal advocacy, *see, e.g., NAACP v. Button*, 371 U.S. 415 (1963); *In re Primus*, 436 U.S. 412 (1978) – particularly where the lawyer's motive is not personal profit but to render aid to the disadvantaged. *See Button*, 371 U.S. at 443-44. The 1996 Restrictions impermissibly intrude into this relationship by stripping LSC-funded lawyers of many basic lawyering tools – the capacity to challenge the constitutionality of government action; the option to prosecute class actions; the right to invoke the benefit of fee-shifting statutes; the ability to seek to persuade policymakers to alter their positions – that all attorneys are ethically bound to employ where necessary for the zealous and effective representation of their clients.

Second, Congress may not use conditions on the receipt of a subsidy to impose viewpoint- or content-based restrictions on the First Amendment activities of lawyers for the poor and their indigent clients. Censorship of the speech-related activities of legal services lawyers by means of such a "carrot"

is as offensive to the First Amendment as is censorship by the "stick." *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). The challenged lawyering restrictions are transparently content-and viewpoint-based limits on the First Amendment activity inherent in legal services representation. A conditional subsidy that allows the lawyer for one side in an adversary proceeding the unlimited use of all substantive and procedural options, while denying those generally available lawyering tools to the subsidized lawyer for the poor, is inherently viewpoint discriminatory because it privileges the viewpoint of one side in a lawsuit at the expense of the other. *See United States v. Eichman*, 496 U.S. 310, 317 (1990) (whether speech restriction constitutes content- or viewpoint-discrimination evaluated based on limitation's impact).

Moreover, the legislative history of the 1996 Restrictions is replete with statements of hostility to the substantive positions advanced by legal services lawyers and their clients. It is clear that the bans on class actions, claims for attorney's fees, and communicating with policymaking officials were intended to weaken the ability of legal services lawyers to advance disfavored legal arguments on behalf of poor people. *See Varshavsky v. Perales*, No. 40767/91, slip op. (Sup. Ct. N.Y. County Dec. 24, 1996) (citing the legislative history of the restrictions as indicative of viewpoint discrimination).

Third, whatever power Congress may enjoy to place onerous conditions on the use of federal funds, Congress may not so restrict a recipient's right to use private donations and local-government funds to engage in First Amendment activity, absent a showing of compelling government need. In the context of this case, the United States has demonstrated no justification – compelling or otherwise – for the challenged requirement that non-federally funded legal services activities be conducted only through "physically separate" programs.

While the district court suggested that the restriction was appropriate in order to avoid confusion by the public concerning the uses to which federal funds are being put, this Court has consistently rejected this justification for restrictions on First Amendment-protected activities. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 769 (1995); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980).

In practice, the onerous and wasteful physical separation requirement has acted as a *de facto* ban on the use of private funds by federally funded legal services offices to provide "restricted" legal services. A parallel "physically separate" entity is so wasteful, onerous, and costly that only a handful of legal services programs in the nation have endured the unnecessary expense of maintaining two "physically separate" legal programs serving the identical indigent community.

REASONS FOR GRANTING THE WRIT

I.

This Court Should Grant Review in Order to Resolve Pervasive Confusion in the Lower Courts and Among Policymaking Officials Over the Scope of the Government's Power to Restrict First Amendment-Related Activity as a Condition of Providing Government Aid.

This Court should grant review in order to resolve pervasive confusion over when government may regulate First Amendment-related activity as a condition of receipt of government aid. Frequent disagreements have emerged in the context of important institutions dependent on a blend of public and private funding – universities, the subsidized press, social services programs, and arts institutions, to take four prominent

examples – at a point where such "mixed" institutions are playing an increasingly vital role in American life. The Court has begun to grapple with these important issues in such recent decisions as *Rust v. Sullivan*, 500 U.S. 173 (1991), *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995), and *Finley v. National Endowment for the Arts*, 118 S. Ct. 2168 (1998), but these cases have left many questions unanswered. Indeed, it has become a truism that existing precedents concerning application of the First Amendment unconstitutional conditions doctrine do not yield clear-cut guidance.[6] Clarification by this Court is needed to provide the lower courts, the government, grant recipients, private funders, and the public at-large with workable guidance concerning the First Amendment ground rules governing this increasingly important "mixed" funding model.

The basic principles of the First Amendment unconstitutional conditions doctrine are easily recited; it is their complex interrelationship that defies predictable application. As an initial matter, it is axiomatic that "Congress may 'selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.'" *Finley*, 118 S. Ct. at 2179 (quoting *Rust*, 500 U.S. at 193). And, "when the government disburses public funds to private entities to convey a *governmental* message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee."

---

[6] *See, e.g.*, William Glaberson, *Hazy Legal Terrain: Museum Fight Pits Free Expression Against Control of Public Spending*, N.Y. TIMES, Sept. 30, 1999, at B12 ("The Supreme Court has ducked a straight-on resolution in every case involving funding") (quoting Harvard Law School Professor Richard H. Fallon, Jr.); *id.* ("This is a black hole of First Amendment law. No one really knows how to think about it, including the Supreme Court Justices") (quoting University of Chicago Law School Professor David A. Strauss).

Rosenberger, 515 U.S. at 833 (citing *Rust*, 500 U.S. at 196-200) (emphasis added).

This broad discretion is, however, subject to several important and related countervailing constraints. First, when the government funds certain traditional associational relationships that are imbued with special First Amendment significance, such as that of a teacher and student in a university, *see Keyishian v. University of the State of N.Y.*, 385 U.S. 589 (1967), or possibly a "traditional" doctor-patient relationship, *see Rust*, 500 U.S. at 200, the government's freedom to restrict the speech and associational activities it has funded is strictly limited. Second, when the government "does not itself speak or subsidize the transmittal of a message it favors" but instead funds speech-related activities by private parties, it is subject to strict limitations on its ability to regulate the speech it funds. *Rosenberger*, 515 U.S. at 834. Third, the government may not, as a condition of extending a subsidy, restrict the range of speech-related activities in which the recipient may engage using funds from other sources. *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984).

This case arises at the crossroads of this region of doctrinal uncertainty, and illustrates how, along at least three axes, the Court's current precedent concerning application of the First Amendment unconstitutional conditions doctrine is in need of clarification. The opacity of current doctrine in this area is underscored by the fact that the majority opinion of the Second Circuit, authored by one of the nation's ablest jurists, appears internally inconsistent and is mistaken with respect to several key questions as to which petitioners seek review.

As the opinion below illustrates, the following complexities must be faced by a conscientious judge attempting to apply current doctrine:

A. This Court Has Not Resolved Whether the Relationship Between a Government-Funded Lawyer and an Indigent Client Enjoys First Amendment Protection from Intrusive Conditions on the Receipt of Government Subsidies Similar to the Protection Enjoyed by a Government-Funded University Teacher and Student.

This Court has long taught that when the government funds certain associational relationships that are imbued with special First Amendment significance, it may not attempt to regulate the First Amendment activities of the funded participants – even though the government remains at all times free to decline to fund the associational activity in the first place. Thus, in *Keyishian*, the First Amendment importance of preserving the free-flow of ideas in a university setting precluded the government from barring government-funded faculty at public colleges from espousing certain ideological positions. *See* 385 U.S. at 606. In *Rosenberger*, similar concerns barred the government from restricting the content of the subsidized student press at a public university. *See* 515 U.S. at 835-36. And, in *Rust*, the Court suggested in *dictum*: "It could be argued by analogy that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government." *Rust*, 500 U.S. at 200.[7]

Cases such as *Rust* and *Rosenberger* have left unresolved whether the legal representation of poor Americans by federally

---

[7] The Court ultimately found it unnecessary to decide the issue, concluding that under the Title X family planning counseling program at issue in that case, doctors played a fairly narrow role as "private entities [funded] to convey a governmental message," *Rosenberger*, 515 U.S. at 834 (characterizing the program in *Rust*), and thus the "doctor-patient relationship established by the Title X program [was not] sufficiently all encompassing" to raise this issue. *Rust*, 500 U.S. at 200.

funded legal services lawyers, and the resulting attorney-client relationship, more closely resemble activities such as university teaching, student publishing, or (possibly) a "traditional" doctor-patient relationship, which enjoy special First Amendment protection from intrusive conditions on government subsidies, or are more akin to a government-funded doctor's dissemination of a government message in a family planning clinic, which enjoys less protection.

While this important issue is unresolved and warrants review by this Court, the argument in favor of recognizing the special First Amendment associational relationship existing between lawyer and client appears overwhelming in view of the unbroken line of authority from this Court emphasizing that the First Amendment confers special protection on the right of lawyers and clients to associate together to advance a client's legal rights through litigation and other forms of legal advocacy. *See NAACP*, 371 U.S. 415; *In re Primus*, 436 U.S. 412; *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967); *see also In re Disability Law Center of N.H.*, 130 N.H. 328, 338, 541 A.2d 208, 214 (1988) (Souter, J.) ("[A]ny encroachment on the First Amendment associational interest of [public interest lawyers to represent clients] must be supported by a 'compelling' justification") (quoting *Button*, 371 U.S. at 439). Indeed, the Court has stressed that the First Amendment values inhering in legal advocacy are strongest where the lawyer's motive is not personal profit, but rather to render aid to the disadvantaged in our society. *See NAACP*, 371 U.S. at 443-44.

In this case, the Court of Appeals sidestepped the question of whether the First Amendment's protection of the attorney-client relationship extends to a government funder's efforts to restrict speech activities, such as lawyering decisions and tools, employed as part of a subsidized attorney-client

relationship. The appellate court held that it need not resolve this issue, reasoning that the attorney-client relationship established under the federal legal services program is no broader than the limited doctor-patient relationship funded in *Rust*, and so the challenged limits must be similarly permissible. *Velazquez*, 164 F.3d at 764-65, App. 16a-17a.

But this reasoning ignores an all-important distinction between this case and *Rust*: the question of whose speech is being subsidized. This Court has stressed that "[w]hen the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps [– including content regulation –] to ensure that its message is neither garbled nor distorted by the grantee." *Rosenberger*, 515 U.S. at 833. This Court found that the Title X counseling program at issue in *Rust* was expressly aimed at disseminating the government's message concerning family planning and, as such, the speech of the medical professionals funded to convey that message was appropriately subject to regulation. *Id. Accord Finley*, 118 S. Ct. at 2190-91 (Souter, J., dissenting) (majority opinion in *Rust* rested on fact of government as speaker, not as funder of others' speech); *compare Rosenberger*, 515 U.S. at 834 (student press subsidies intended to facilitate speech activities by students – not by the funding public university – subject to First Amendment restrictions on regulation of speech). As *Rosenberger* notes, the question of who is the true speaker – the government or the government-funded individual – is crucial, since it is highly unlikely that an intensely protected associational relationship will exist when one of the participants is a paid spokesperson for a single government message.

Unlike the Title X program in *Rust*, attorneys for the poor funded under the federal legal services program do not function as "private entities [provided] to convey a governmental message." *Rosenberger*, 515 U.S. at 834 (characterizing the

program in *Rust*). Rather, Congress self-consciously structured the legal services program to assure that hundreds of autonomous local "speakers" would exist to minimize the possibility of government interference with the autonomy of government-funded lawyers for the poor. Legal services lawyers bear all of the hallmarks of traditional lawyers who must represent their clients – thousands of individual poor persons, many seeking to petition government for the redress of grievances – pursuant to the highest professional standards.[8] Since the ruling below reflects (indeed, it acknowledges) a pervasive uncertainty regarding the types of traditional roles and relationships that enjoy special First Amendment associational protection against content- and viewpoint-based regulation imposed as a condition of government funding, review by this Court is particularly appropriate.

---

[8] The LSC Act states that LSC is intended to: provide "equal access to the system of justice in our Nation for individuals who seek redress of grievances," reaffirm the faith of the poor in the rule of law, provide representation of "high quality," and "serve best the ends of justice." Pub. L. No. 93-355, §1001 (1)-(4), 88 Stat. 378 (1974) (codified as amended at 42 U.S.C. §§ 2996(2), (3)). The Act states: "To preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressures; and . . . attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics and the high standards of the legal profession." 42 U.S.C. §§ 2996 (5)-(6). The Act further prohibits LSC from "interfer[ing] with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and Code of Professional Responsibility of the American Bar Association." Finally, the Act directs LSC to "insure the maintenance of the highest quality of service and professional standards, the preservation of attorney-client relationships, and the protection of the integrity of the adversary process from any impairment in furnishing legal assistance to eligible clients . . . ." 42 U.S.C. § 2996f(a)(1).

B. This Court Has Not Resolved the Circumstances Under Which Restrictions on the First Amendment Activities of Government-Funded Lawyers for the Poor Constitute Forbidden Viewpoint-Based Discrimination.

Cases such as *Rosenberger* and *Finley* have left unresolved the circumstances under which restrictions, imposed as conditions on the receipt of government funding, that limit First Amendment activities by persons holding certain disfavored positions, constitute forbidden viewpoint-based discrimination. In this case, plaintiffs challenge the lawyering restrictions – including bans on communicating with policymaking authorities, bans on class actions, and bans on fee-shifting even when authorized by statute – that Congress has imposed on legal services attorneys as a condition of federal assistance.

A conditional subsidy that allows the lawyer for one side in an adversary proceeding the unlimited use of all procedural options, while denying those generally available lawyering tools to the subsidized lawyer for the poor, would appear to be inherently viewpoint discriminatory because it privileges the viewpoint of one side in a lawsuit at the expense of the other. Yet the Court's cases concerning when conditions on government grants that tend to disfavor a particular category of speaker are deemed viewpoint discriminatory are far from consistent. For example, in *Rosenberger*, the Court held that a public university policy denying publishing subsidies to student groups espousing religiously based perspectives constituted impermissible viewpoint discrimination. 515 U.S. at 831. But *Finley* held that a government policy of allocating subsidies for the arts using precatory content-based criteria of "decency" and "respect" does not so offend the First Amendment, 118 S. Ct. at 2175-78, even though it is not obvious that the range of "indecent" or "disrespectful" artistic viewpoints so burdened

is any broader than the spectrum of religious viewpoints at issue in *Rosenberger.*

In this case, the legislative history of the 1996 Restrictions is replete with statements of hostility to the substantive positions advanced by legal services lawyers and their clients, and it is clear that the bans on class actions, claims for attorney's fees, and communication with policymaking officials were intended to weaken the ability of legal services lawyers to advance disfavored legal arguments on behalf of poor people. *See Varshavsky v. Perales*, No. 40767/91, slip op. (Sup. Ct. N.Y. County Dec. 24, 1996) (citing the legislative history of the restrictions as indicative of viewpoint discrimination).

The court below recognized that Congress's effort to bar federally funded legal services lawyers from challenging the constitutionality of a welfare statute or the legality of a welfare regulation violated the First Amendment because it constituted a viewpoint discriminatory restriction on the ability of legal services lawyers to represent their indigent clients. *Velazquez*, 164 F.3d at 769-72, App. 26a-36a. Petitioners believe that Judge Leval's thoughtful perception should have led him to strike down several other restrictions on the ability of legal services lawyers to provide effective legal representation, including the utterly irrational ban on communicating with policymaking authorities, and the ban on class actions. But he became enmeshed in an effort to apply the complexities of existing precedent, and erroneously failed to follow his own logic to its conclusion. The Court of Appeals reasoned that, because all but one of these lawyering prohibitions denies a particular tool to legal services lawyers without specific reference to how that tool might be used, the restrictions are viewpoint neutral. *Id.* at 767-69, App. 24a-29a.

Such interpretive formalism is deeply flawed. For, whatever one's view of the subjective motivation underlying Congress's assault on legal services, the effect of the restrictions is to disadvantage a clearly defined set of legal positions and viewpoints – those supporting the interests of the poor. The panel opinion appears to assume that legal services lawyers are equally likely to be found on all sides of an issue, rendering limits on their procedural options equally damaging to all substantive positions. But such a formal vision ignores the fact that legal services lawyers are statutorily required to confine their representation to indigent persons. The best interests of extremely poor clients will rarely cause a legal services lawyer to espouse an expansive view of the rights of landlords, or to argue for a narrow view of welfare eligibility, or to champion the rights of secured creditors, or to urge retention of the exclusive use of property taxes to fund public schools. The fact is that when legal services lawyers are selectively denied critical procedural tools, the disadvantage falls with disproportionate force on substantive arguments that advance the legal rights of the poor. As Justice Frankfurter warned long ago, invoking the ironic observations of Anatole France, "Law addresses itself to actualities" and forbids courts from "be[ing] willfully blind" to its consequences for the poor. *See Griffin v. Illinois*, 351 U.S. 12, 23 (1956) ("The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.") (Frankfurter, J., concurring in judgment) (quoting Anatole France from JOHN COURNOS, A MODERN PLUTARCH 27 (1928)).

Not only does the appellate court's formalistic approach blink at reality, but it contravenes this Court's teaching. Where government restricts a speech-related activity without express reference to the content or viewpoint of any message it might express, constitutional permissibility must nonetheless be assessed in view of the "likely communicative impact" of the

proscribed activity. *United States v. Eichman*, 496 U.S. 310, 317 (1990). Thus, where, as here, a formally content- and viewpoint-neutral prohibition serves, in practice, to disadvantage speech activities identified with a particular viewpoint, they must be treated as such. Thus, this Court should grant review to provide urgently needed guidance as to when speech restrictions imposed as conditions of government grants constitute impermissible viewpoint discrimination.

C. This Court Has Not Resolved Whether Onerous Restrictions on the Use of Private Donations and Local-Government Funds, Such as an Unnecessary Requirement of Physical Separation Between Government-Subsidized and Non-Subsidized Speech Activities, Are an Unconstitutional Condition in Violation of the First Amendment.

Finally, cases such as *Rust* and *FCC v. League of Women Voters*, 468 U.S. 364 (1984), have left unresolved the critical question of when onerous requirements concerning the wasteful physical separation of government subsidized activities from non-government subsidized activities impermissibly burden the right to engage in First Amendment-protected activities with non-governmental funds. In practice, the requirement of maintaining two wasteful and duplicative "physically separate" legal programs is so onerous that, in the more than two years that the "physically separate" option has been open to local legal services offices, it has proven virtually impossible to use it.

It is well settled that even where a government funder may restrict the speech activities in which a subsidy recipient may engage using government funds, the recipient retains a First Amendment right "to segregate its activities according to the source of its funding," *League of Women Voters*, 468 U.S. at 400, and to continue to "speak outside the scope of the

Government-funded project." *Rust*, 500 U.S. at 199. While a government funder may not bar such uses of non-government funds, it may, nevertheless, insist that its funds are not used for an unauthorized purpose. Thus, in *League of Women Voters*, the Court held that a public television station barred from editorializing as a condition of federal funding, must be permitted "to establish [an] 'affiliate' organization[] which could then use the station's facilities to editorialize with non-federal funds." 468 U.S. at 400. In *League of Women Voters*, the Court indicated that while a government funder could require a degree of organizational separation – including, possibly, separate incorporation and bookkeeping – between a fund recipient's subsidized and unsubsidized activities, physical separation was not required. *See id.* ("[unsubsidized] 'affiliate' organization . . . could then use the station's facilities"). *Accord Regan v. Taxation With Representation*, 461 U.S. 540, 544 (1983) (separately incorporated affiliate).

Subsequently, however, in *Rust* the Court upheld a more extensive – and burdensome – set of separation requirements, which included not just financial but also physical separation of subsidized and non-subsidized activities. *Rust*, 500 U.S. at 180-81; *id.* at 197-99. The *Rust* Court did not explain its basis for upholding, not merely financial separation (*i.e.*, segregation of funds), but physical separation, as well. *Rosenberger* suggests that the *Rust* physical separation requirement may have been justified as a "step[] to ensure that [communication of the government's] message [wa]s neither garbled nor distorted by the grantee," *Rosenberger*, 515 U.S. at 833 – a concern that is not present in this case. Moreover, the District Court explicitly found that physical separation was unnecessary to assure that federal funds would not be used to subsidize "restricted" activity. The District Court noted that careful record-keeping, and accurate accounting, already required by LSC, would prevent cross-subsidization. *Velazquez*, 985 F. Supp. at 339, App. 89a. The sole justification recognized by

the District Court for requiring physically separate facilities was to avoid confusion by the public concerning the uses to which federal funds are being put, or the appearance of endorsement by the government. *See id.* But this Court has repeatedly refused to permit fear of confusion over endorsement to be deployed as an excuse for censorship, or for severe burdens on speech. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 769 (1995); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 655 (1994); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980).[9]

As an onerous condition substantially burdening a recipient's speech financed by non-government funds, a physical separation requirement is permissible only if necessary to advance a compelling government interest. The current case law's inconsistent and inappropriately burdensome standards

---

[9] In *Pruneyard*, for example, a shopping center owner argued that it was unlawful for California to force him to permit First Amendment activity on his premises, because observers might believe that he endorsed the activity. The Court rejected the argument, noting that public confusion over endorsement was unlikely, and that, in any event, disclaimers were sufficient to prevent confusion about endorsement. *See* 447 U.S. at 87.

Similarly, in *Capitol Square*, Ohio argued that it was justified in banning the display of a Ku Klux Klan cross on public property, because the public might believe that the government endorsed the Klan's religious message in violation of the Establishment Clause. Once again, the Court rejected fear of confusion over endorsement as a justification for censorship. *See* 515 U.S. at 769. Four members of the *Capitol Square* Court (the Chief Justice and Justices Scalia, Kennedy, and Thomas) argued that as long as the government acted in a neutral fashion, "erroneous conclusions [about state endorsement] do not count." Id. at 765. Three members of the Court (Justices O'Connor, Breyer, and Souter) opined that the possibility of disclaimer vitiated any concern over a misperception of endorsement. *See id.* at 776, 783, 794 (concurring in part and concurring in the judgment). In *League of Women Voters* as well the Court rejected a fear of confusion over endorsement as a justification for restricting the use of non-federal funds. *See* 468 U.S. at 395.

concerning the degree of separation that can be demanded between a grant recipient's subsidized, speech-restricted activities and its unsubsidized, unrestricted activities warrants review by this Court.

II.

This Court Should Grant Review to Consider Whether Federally Chartered Nonprofit Corporations, Such as LSC, Are Entitled to *Chevron* Deference When They Issue Interpretive Regulations That Contravene the Express Language of the Congressional Statute.

Another issue requiring review by this Court is the refusal of the lower courts to apply the plain language of the congressional statute, as opposed to the effort by LSC to rewrite the statute by means of a series of implementing regulations designed to rescue the statute from constitutional oblivion. Virtually all agree that, as drafted, the plain language of the statute is unconstitutional under *League of Women Voters*. The court below accorded LSC's regulation rewriting the statute full deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *Velazquez*, 164 F.3d at 763-64, App. 13a-15a. However, basic respect for separation of powers, especially in the context of an independent corporation that is the recipient of congressional appropriations, calls for scrupulous compliance with Congress's norms – not an open-ended invitation to rewrite Congress's handiwork. If Congress wishes to re-enact the LSC regulation as its own, it may do so. But, until Congress acts, the operative restrictions must be found in the statute, not in a rewrite that contravenes the statute's literal wording by an independent corporation that is not even a part of the Executive Branch. *See Chevron*, 467 U.S. at 866 (deference to administrative interpretation derives from "Constitution['s] vest[ing of] . . . responsibilities [for assessing the wisdom of policy choices] in the political

branches"); *see also Regional Management Corp. v. Legal Services Corp.*, 186 F.3d 457, 1999 WL 547925 (4th Cir. July 28, 1999) (LSC not a federal agency and Congress has not provided that it should be treated as a federal agency for administrative law purposes); *Spokane County Legal Services v. Legal Services Corp.*, 614 F.2d 662 (9th Cir. 1980) (same). *But see Texas Rural Legal Aid v. Legal Services Corp.*, 940 F.2d 685 (D.C. Cir. 1991) (while LSC not a federal agency, its administrative interpretations nonetheless entitled to *Chevron* deference). Thus, this case squarely raises the important question of the degree of *Chevron* deference available to independent entities authorized to disburse federal funds.

III.

This Court Should Grant Review Because the Constitutionality of the 1996 Legal Services Restrictions Is of Great National Significance, the Decision Below is Erroneous, and this Petition May Be the Court's Only Opportunity to Resolve These Issues Because Congress Has Statutorily Barred Legal Services Programs and Attorneys from Bringing Future Litigation Against LSC.

The constitutionality of the 1996 Legal Services Restrictions is of profound national importance. The restrictions at issue make it all but impossible for many legal services lawyers to perform their historic roles as vigorous and effective defenders of the rights of the poor. For example, as a direct result of Congress's ban, legal services lawyers were forced to withdraw from more than 600 pending class actions, involving tens of thousands of indigent clients, putting intense pressure on inadequate private and local resources to provide alternative legal representation. Worse still, for each day that the restrictions remain in place, class actions offering the only feasible means of addressing systematic violations of the rights of the poor cannot be brought; contacts with policymakers

affording the most sensible means of resolving problems of poor persons cannot be made; and claims for recovery of attorney's fees – often critical in inducing defendants to take seriously the rights of the poor – cannot be made. Unless and until the unconstitutional restrictions on the use of federal funds are lifted, "equal justice under law" cannot be achieved for indigent persons.

Moreover, private, state, and local funds available for the provision of effective legal services to the poor are currently in legal limbo, since many donors wishing to provide assistance to legal services offices are reluctant to do so because the funds may become subject to congressional restriction. In areas like New York City, where more that 50% of funds available to support legal services for the poor are provided by private donations and state and local subsidies, non-federal donors wishing to support a legal services office are put to an unconstitutional Hobson's choice. Either a non-federal donor can achieve efficient utilization of funds by acceding to Congress's restrictions, or the donor can escape Congress's restrictions, but only by squandering a significant percentage of the funds on wasteful duplication to establish a "physically separate" program. The net result is a classic exercise in Pareto inefficiency. Instead of an efficient use of the available federal and non-federal funds in a shared facility where fixed costs can be spread over the available federal and non-federal resources in accordance with appropriate accounting principles, federal and non-federal funders alike must establish wasteful and duplicative "physically separate" programs, each of which must bear duplicative fixed costs. In a world where inadequate resources exist to provide legal services for the poor, such an unconstitutional waste of resources cries out for review.

This petition may be this Court's only opportunity to address the First Amendment issues raised by Congress's restrictions because Congress has attempted to insulate its

actions and those of LSC from any further judicial scrutiny by means of a statutory enactment barring federally funded legal services programs and attorneys from initiating or participating in any future litigation against LSC. *See* Pub. L. No. 105-119, § 504(c)(5), 111 Stat. at 2512, App. 142a. Such an attempt to preclude any future examination of these questions makes review of the instant petition that much more urgent.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BURT NEUBORNE
Counsel of Record
E. JOSHUA ROSENKRANZ
DAVID S. UDELL
DEBORAH GOLDBERG
KIMANI PAUL-EMILE
PHILIP G. GALLAGHER
PAUL K. SONN
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
161 Avenue of the Americas,
Fifth Floor
New York, New York 10013
(212) 998-6730

PETER M. FISHBEIN
PAUL C. LLEWELLYN
ALAN ROTHMAN
KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, LLP
425 Park Avenue
New York, New York 10022
(212) 836-8000

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED JANUARY 7, 1999

Carmen VELAZQUEZ, et al, Plaintiffs-Appellants,
v.
LEGAL SERVICES CORPORATION, Defendant-Appellee, United States of America, Intervenor-Appellee.

No. 2020, Docket 98-6006.

United States Court of Appeals,
Second Circuit.

Argued March 20, 1998.

Decided Jan. 7, 1999.

* * *

Before: JACOBS, LEVAL, and GIBSON,* Circuit Judges.

Judge JACOBS concurs in part and dissents in part in a separate opinion.

LEVAL, Circuit Judge:

This appeal concerns the validity of restrictions imposed by Congress and the Legal Services Corporation ("LSC")

---

* The Honorable John R. Gibson of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

on the professional activities of entities that receive funding from LSC ("LSC grantees"). Plaintiffs are lawyers employed by New York City LSC grantees, their indigent clients, private contributors to LSC grantees, and state and local public officials whose governments contribute to LSC grantees. Plaintiffs sought a preliminary injunction against the enforcement of the restrictions, contending they violate various provisions of the U.S. Constitution. The district court denied a preliminary injunction, finding that plaintiffs had failed to establish a probability of success on the merits. We affirm in part and reverse in part.

I. Background

A. The Legal Services Corporation and the Challenged Statute. LSC is a non-profit government-funded corporation, created by the Legal Services Corporation Act of 1974 ("LSCA"), 42 U.S.C. § 2996 et seq., "for the purpose of providing financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance." 42 U.S.C. § 2996b(a). LSC fulfills this mandate by making and administering grants to hundreds of local organizations that in turn provide free legal assistance to between 1,000,000 and 2,000,000 indigent clients annually. See Texas Rural Legal Aid v. Legal Services Corp., 940 F.2d 685, 688 (D.C.Cir.1991); S. Rep. 104-392 at 2-3 (1996). Many LSC grantees are funded by a combination of LSC funds and other public or private sources. S. Rep. 104-392 at 3; A. 225, A. 297. LSC grantees are governed by local Boards of Directors who set policies and priorities in response to local conditions and client needs. LSC is empowered to implement the LSCA through the

traditional administrative rulemaking process. Tex. Rural Legal Aid, 940 F.2d at 692.

From the outset of the LSC program, LSC grantees have been restricted in the use of LSC funds. See 42 U.S.C. § 2996f(b)(1)-(10) (prohibiting use of LSC funds in, inter alia, most criminal proceedings, political activities, and litigation involving nontherapeutic abortion, desegregation, or military desertion). Recipient organizations are also barred from using most nonfederal funds for any activity proscribed by the LSCA. See 42 U.S.C. § 2996i(c).

In 1996, Congress substantially expanded the restrictions on activities of LSC grantees. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub.L. No. 104-134, § 504, 110 Stat. 1321, 1321-53-56 (1996) ("OCRAA," or "the 1996 Act"), reenacted in the Omnibus Consolidated Rescissions and Appropriations Act of 1997, Pub.L. 104-208, § 502, 110 Stat. 3009 (1997). Section 504 of OCRAA, set forth below in pertinent part,[1] bars the use of LSC funds

---

1. None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . . —

> (2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency (the "executive branch provision");
>
> (3) that attempts to influence any part of any adjudicatory proceeding of any Federal,

(Cont'd)

Appendix A

(Cont'd)

State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect (the "agency adjudication provision");

(4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body (the "legislation provision") (subsections (2), (3), and (4) are collectively the "lobbying provisions");

(5) that attempts to influence the conduct of oversight proceedings of the [LSC] or any person or entity receiving financial assistance provided by the Corporation (the "LSC oversight provision"); . . .

(7) that initiates or participates in a class action suit (the "class action provision"); . . .

(11) that provides legal assistance for or on behalf of [certain] alien[s] (the "aliens provision");

(12) that supports or conducts a training program for the purpose of advocating a particular public policy or encouraging a political activity, a labor or antilabor activity, a boycott, picketing, a strike, or a demonstration . . . (the "training provision");

(13) that claims (or whose employee claims), or collects and retains, attorneys' fees

(Cont'd)

to aid entities that perform various activities including lobbying, participation in class actions, providing legal assistance to aliens in certain categories, supporting advocacy training programs, collecting attorneys' fees under fee shifting laws, litigating on behalf of prisoners, and seeking to reform welfare.[2]

(Cont'd)

> pursuant to any Federal or State law permitting or requiring the awarding of such fees (the "attorneys' fees provision"); . . .
>
> (15) that participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison (the "incarcerated client provision");
>
> (16) that initiates legal representation or participates in any other way in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation (the "welfare reform provision").

OCRAA, §§ 504(a)(2)-(5), (7), (11)-(13), (15)-(16).

2. The 1996 legislation also restricted LSC grantees from litigation or activity involving political redistricting, § 504(a)(1) and from litigation "with respect to abortion," § 504(a)(14). Plaintiffs do not challenge these restrictions.

Appendix A

Congress left no question of its intention to restrict grantees' use of non-federal and federal funds alike. The Act provides that while program recipients may "us[e] funds received from a source other than the Legal Services Corporation to provide legal assistance, . . . such funds may not be expended by recipients for any purpose prohibited by this Act." § 504(d)(2)(B). Moreover, § 504(d)(1) requires recipients to notify all non-federal donors that their contributions "may not be expended for any purpose prohibited by . . . this title."

In August 1996, LSC proposed regulations to implement the 1996 Revisions, which, inter alia, (1) prohibited a grantee from "us[ing] non-LSC funds for any purpose prohibited by the LSC Act," 61 Fed.Reg. 41960, 41962 (1996); (2) prohibited any organization controlled by a grantee from pursuing restricted activities (the "interrelated organizations prohibition"), see id.; 50 Fed.Reg. 49276, 49279 (1985) (defining "control" as "the ability to determine the direction of [or] influence the management or policies" of another organization); and (3) applied the OCRAA restrictions to any third party to whom a grantee transfers LSC funds, and to any private funds transferred from a grantee to a third party irrespective whether the funds were private or public (the "transfer of funds provision"). 61 Fed.Reg. 63749, 63752 (1996). The combined effect of the regulations was to prohibit LSC grantees from engaging in any restricted activity, even through a legally distinct affiliate organization. These regulations were promulgated in December 1996. See 45 C.F.R. §§ 1610.3, 1610.8 (1996).

B. The Challenges to the Statute and Implementing Regulations. Plaintiffs filed this lawsuit in January 1997, alleging that the restrictions on the use of non-federal monies violate their rights under First, Fifth, and Tenth Amendments to the United States Constitution. They also claimed that the restrictions on the use of federal funds violate the First Amendment, the doctrine of Separation of Powers, and the Tenth Amendment. Plaintiffs sought a preliminary injunction only to enjoin restrictions on the use of non-federal funds.

Soon after this suit was filed, and before the hearing on plaintiffs' application for a preliminary injunction, a federal district court in Hawaii issued an order partially granting a motion by a different set of plaintiffs to preliminarily enjoin enforcement of the OCRAA restrictions. See Legal Aid Society of Hawaii v. Legal Servs. Corp., 961 F.Supp. 1402 (D.Haw.1997) ("LASH I"). LASH I concluded that under Rust v. Sullivan, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) and other Supreme Court decisions, congressional restrictions on the activities of federally-funded entities were permissible only so long as they "left open adequate channels for [protected] speech."[3] 961 F.Supp. at 1414. Applying this

---

3. Because there is considerable overlap between the issues contested in Rust and those presented by this appeal, we briefly review that opinion.

The Rust plaintiffs brought a facial challenge to conditions attached by the Department of Health and Human Services to family planning services provided under Title X of the Public Health Service Act. See 500 U.S. at 178-79, 111 S.Ct. 1759. The Act provided that no Title X funds "shall be used in programs where abortion is a

(Cont'd)

standard, the court found that the LSC regulations unduly burdened grantees' protected First Amendment rights to lobby, to associate, and to have meaningful access to courts. Central to the court's analysis was its finding that the

---

(Cont'd)
method of family planning." Id. at 178, 111 S.Ct. 1759 (quoting statute). The challenged regulations endeavored "to provide clear and operational guidance to grantees about how to preserve the distinction between Title X programs and abortion as a method of family planning." Id. at 179, 111 S.Ct. 1759 (internal quotation marks omitted).

The regulations attached three principal conditions on the grant of federal funds for Title X projects. First, Title X projects were precluded from "provid[ing] counseling concerning the use of abortion as a method of family planning or provid[ing] referral for abortion as a method of family planning." Id. Second, Title X projects could "not encourage, promote, or advocate abortion as a method of family planning." Id. at 180, 111 S.Ct. 1759. Third, the regulations provided that the Title X project must be "physically and financially separate from prohibited abortion activities." Id. The regulations set forth a nonexclusive list of factors to determine whether the separateness requirement had been met. Id. at 180-81, 111 S.Ct. 1759.

The Supreme Court rejected plaintiffs' viewpoint discrimination and unconstitutional conditions arguments. The Court concluded that the government "has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another." Id. at 193, 111 S.Ct. 1759. The Court rejected the unconstitutional conditions claim with the observation that Congress has "not denied the right to engage in abortion related activities [but] merely refused to fund such activities out of the public fisc." Id. at 198, 111 S.Ct. 1759.

interrelated organizations prohibition barred LSC grantees from creating affiliate organizations that could engage in restricted activity. See LASH I, 961 F.Supp. at 1415-16. The court held that as implemented, the 1996 restrictions denied to grantees not only the ability to undertake restricted activity directly, but also all alternative channels for exercise of these constitutionally protected activities. The court therefore determined that plaintiffs' constitutional challenge was likely to prevail on the merits and enjoined enforcement of portions of the OCRAA restrictions. See id. at 1421-22.

In order to cure these constitutional infirmities, LSC issued "interim regulations" in March 1997 modelled after the restrictions upheld by the Supreme Court in Rust. See 62 Fed.Reg. 12101, 12101-04 (1997) (interim regulations "are intended to address constitutional challenges raised by the previous rule"); Legal Aid Society of Hawaii v. Legal Services Corp., 981 F.Supp. 1288, 1290 (D.Haw.1997) ("LASH II"); Velazquez v. Legal Services Corp., 985 F.Supp. 323, 332-333 (E.D.N.Y.1997). The interim regulations modified the earlier rules in two important respects. LSC revised the transfer of funds rules so that, in most cases, non-federal funds transferred by a grantee to a controlled affiliate would cease to be subject to the restrictions. Compare 62 Fed.Reg. 12101, 12103, § 1610.7 (1997) with 45 C.F.R. § 1610.7 (1996) (61 Fed.Reg. 63749, 63752). Equally important, a new section entitled "Program Integrity of Recipient," 62 Fed.Reg. 12101 at 12103-04, § 1610.8, provided that grantees could maintain a relationship with "affiliate" organizations, which could in turn engage in restricted activities so long as the association between the organizations met standards of "program integrity." The

nonexclusive list of factors relevant to the determination of program integrity were (1) the existence of separate personnel; (2) the existence of separate accounting and timekeeping records; (3) the existence of separate facilities; and (4) the extent to which signage and identification distinguishes recipient from affiliate. Id. at 12104.

Ten days after the interim rules were promulgated, the court below held a hearing on the plaintiffs' motion for a preliminary injunction. See 985 F.Supp. at 332. The district court found that "although based on the Rust program integrity requirements," the interim regulations differed from those approved in Rust in three ways. Id. at 333. First, the LSC regulations, unlike Rust, included provisions that organizations under the "control" of a grantee would be subject to the statutory restrictions, unless the program integrity requirements were met. See id. Second, while the Rust regulations provided that "the 'degree of separation' of facilities would be considered," the interim regulations required the "existence" of separate facilities. Id. Third, the Rust regulations provided that the determination "whether a recipient and affiliate were sufficiently separate would be based on all 'facts and circumstances' whereas the interim regulations made no such statement, which arguably implied that [to satisfy the separation rules] a recipient would have to satisfy each and every program integrity factor." Id. at 333-34.

The district court expressed some doubt as to the constitutionality of the interim regulations but nevertheless delayed decision. Observing that "these are interim regulations," the district court determined that it might "be provident to withhold judgment until the final regulations

were promulgated." Id. at 334. The court speculated that "maybe after we have this argument today, there will be more regulations," and therefore undertook to "allow[ ] some period of time to let the dust settle until we get final regulations." Id.

On May 21, 1997, LSC replaced the interim regulations with a "Final Rule" (the "final regulations"). See id. As the district court noted, "[t]he revised program integrity section eliminates virtually every difference between the interim regulations and the Rust regulations in respect to program integrity requirements." Id. at 335. The three differences between the LSC regulations and the Title X regulations approved in Rust noted by the court at the March hearing were eliminated. See id. Concluding that the final regulations represented a permissible construction of the 1996 Act, see id. at 338-39, and were consistent with the First Amendment, the district court determined that the statute and regulations were not likely to be invalidated and therefore denied the motion for a preliminary injunction. See id. at 326-27.[4] This appeal followed.

---

4. The district court also rejected plaintiffs' due process and equal protection challenges. See id. at 344. These claims have been abandoned on appeal.

The LASH court reached a result similar to the decision of the district court in this case, dismissing the unconstitutional conditions challenge with the observation that the "reasoning [of Rust] controls the result here." LASH II, 981 F.Supp. at 1299, aff'd in relevant part, Legal Aid Society of Hawaii v. Legal Servs. Corp., 145 F.3d 1017 (9th Cir.1998) (LASH III). Among the issues before us, LASH III only addressed the unconstitutional conditions challenge. The Ninth Circuit did not address the claims based on abridgment of the lawyer-client relationship or viewpoint discrimination.

Appendix A

II. Discussion

On appeal, plaintiffs object that the final regulations represent an unreasonable interpretation of the 1996 Act, and therefore fail under Chevron USA Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Plaintiffs also challenge the constitutionality of the 1996 Act and the final regulations, arguing that they impermissibly burden grantees' exercise of First Amendment activities, contrary to the command of Rust v. Sullivan, and that they constitute a viewpoint-based restriction on expression.

The posture of this appeal imposes upon plaintiffs a heavy burden. Because this is a facial challenge to legislative action, we need only determine whether there are "any circumstances under which the prohibitions of the Act are permissible in order to uphold the Act." Able v. United States, 88 F.3d 1280, 1290 (2d Cir.1996); see also Rust, 500 U.S. at 183, 111 S.Ct. 1759 (plaintiffs "must establish that no set of circumstances exist under which the Act would be valid. The fact that the regulations might operate unconstitutionally under some conceivable set of circumstances is insufficient to render them wholly invalid.") (citation omitted). Plaintiffs' burden is also increased because the preliminary injunction they seek is against the government. Grant of a preliminary injunction normally requires a showing by the moving party of irreparable harm and either (1) a probability of success on the merits or (2) sufficiently serious questions going to the merits of the case to make them a fair ground for litigation, and a balancing of the hardships tipping decidedly in favor of the moving party.

See Genesee Brewing Co. v. Stroh Brewing Co., 124 F.3d 137, 142 (2d Cir.1997). But where a preliminary injunction is sought against the enforcement of governmental rules, the movant may not invoke the "fair ground for litigation standard" but must show "likelihood of success." See International Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 70 (2d Cir.1996).

A. Statutory Claim

We consider first plaintiffs' contention that the final regulations constitute an unreasonable interpretation of the 1996 Act. Plaintiffs claim that LSC's original rules, which precluded grantees from establishing or funding affiliates with the purpose of undertaking restricted activity, fairly reflected the statutory text. They maintain that the more lenient final rules, crafted after LASH I held the original rules unconstitutional, conflict with congressional command. Plaintiffs ask us to find that the final rules are unauthorized by the statute, and that the statute, without the flexibility provided by the final rules, is unconstitutional. See Appellants' Br. at 40.

LSC enjoys "the full measure of interpretive authority under the [LSCA]" and its interpretations of the Act are entitled to deference under Chevron. See Texas Rural Legal Aid, 940 F.2d at 690. Under this standard, LSC's regulations must be upheld unless "Congress has directly spoken to the precise question at issue" and LSC has resolved it contrary to statute, or unless the regulation cannot be termed a "permissible construction" of the statute or is arbitrary or capricious. See id.; Chevron, 467 U.S. at 842-44, 104 S.Ct. 2778.

Plaintiffs argue that Congress plainly intended to bar LSC grantees from undertaking restricted activities through affiliate organizations. This argument relies principally on § 504(d)(2)(B) of the Act, which provides that LSC grantees may "use[ ] funds received from a source other than the Legal Services Corporation to provide legal assistance . . . except that such funds may not be expended by recipients for any purpose prohibited by this Act or by the Legal Services Corporation Act." According to plaintiffs, this language plainly articulates Congress's desire to prohibit grantees from engaging in restricted activity through an affiliate, even with non-federal funds. By permitting grantees to fund affiliates who engage in restricted activity, argue plaintiffs, the final rules impermissibly allow non-LSC funds to be "expended by recipients" for prohibited purposes. Plaintiffs claim to find support in the legislative history, which explains that "[t]he legislation prohibits the use of alternative corporations to avoid or evade the provisions of the law." S.Rep. No. 104-392 at 13 (1996). Plaintiffs contend that the final rules — which authorize grantees to create affiliates and fund them with nonfederal moneys allowing them to conduct activity proscribed under the Act — facilitate a purpose expressly precluded by Congress, and thus fail under the first step of Chevron.

We are not persuaded. Nowhere in the statute does Congress speak directly to the question whether grantees may create and support affiliate organizations. The Act does not indicate whether a transfer of non-federal funds by a grantee to an affiliate, or the affiliate's subsequent use of such transferred non-federal funds for a prohibited purpose, constitutes an "expend [iture] by [a] recipient[ ]" under the

Act. We conclude that Congress has not spoken clearly regarding grantees' authority to design and fund affiliate organizations, so that the first prong of Chevron is inapplicable.

We are also reluctant to accept plaintiffs' invitation to find that the final regulations are unauthorized, and that the statute without those regulations is unconstitutional, because of the rule favoring an interpretation of a statute that preserves its constitutionality. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988); Hooper v. California, 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895).

We find, moreover, that the final rules represent a "permissible construction" of the Act and therefore survive the second Chevron inquiry. While the legislative history may give some support to the view that Congress intended to prevent grantees from creating affiliates to undertake restricted activity, the statutory text is silent on the point. We conclude that the LSC regulations are not inconsistent with or unauthorized by the terms of the Act.

B. Constitutional Claims

1. Lawyer-Client Relationship. Plaintiffs contend that the First Amendment forbids Congress from interfering with the "intense associational bond" between lawyer and client, even when Congress funds the relationship. Appellants' Br. at 30. Plaintiffs allege that the welfare reform provision, the attorneys' fees provision, and the lobbying provisions

encroach upon "the autonomy and professional judgments" of LSC lawyers, in violation of their First Amendment rights.

Plaintiffs rely heavily on dictum drawn from Rust v. Sullivan. There, the Supreme Court remarked, "It could be argued . . . that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government." 500 U.S. at 200, 111 S.Ct. 1759. Rather than address the argument, however, the Rust court found that "the doctor-patient relationship established by the Title X program [was not] sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." Id. Because Title X patients should be on notice that the scope of care received was subject to Congressional limitation, a "traditional" or "all-encompassing" doctor-patient relationship could not be said to exist. Id. Plaintiffs interpret this passage to extend constitutional protection to the doctor-patient relationship, and, by analogy, to the lawyer-client relationship.

We find the argument unconvincing. As a preliminary matter, Rust did not confer constitutional protection on the doctor-patient relationship. The opinion only speculated that the relationship may be protected from government regulation and expressly declined to resolve the question. Id. The question was left open in Rust and remains open today.

Nor need we resolve it here. Even if we assume that an "all-encompassing" lawyer-client relationship enjoys

heightened protection from government regulation, the lawyer-client relationships funded by LSC are no more "all-encompassing" than the doctor-patient relationships funded under Title X, which were considered in Rust. As noted above, the LSCA has always limited the range of legal services available through LSC grantees. See 42 U.S.C. § 2996i(c). Indeed, grantees have historically limited their representations to selected issues, and are typically "able to meet only a fraction of the demand for their services." See Overview of LSC at 4 (1996) (http://ltsi.ncs/lsc/about.html). Because grantee lawyers are bound to explain to prospective and actual clients the limitations imposed by the 1996 restrictions, and may refer clients to lawyers unencumbered by the restrictions, there is no reason to fear that clients will detrimentally rely on their LSC lawyers for a full range of legal services. The LSC lawyer-client relationship cannot, therefore, be considered "sufficiently all encompassing so as to justify an expectation on the part of the [client] of comprehensive [legal] advice." Rust, 500 U.S. at 200, 111 S.Ct. 1759. Accordingly, we need not decide whether the traditional lawyer-client relationship enjoys constitutional protection, because (as in Rust) such a relationship does not exist for practitioners and clients operating under the challenged statutory scheme.

Nor do plaintiffs provide any basis to question the validity of the scheme itself. Just as Congress is entitled to provide a limited range of medical services under Title X, it is free to offer a limited menu of legal services under the LSCA. We think it clear, for example, that Congress could fund a legal aid office but limit its practice to specific services such as representing the indigent in landlord-tenant disputes

or in consumer fraud cases. The limitations of the 1996 Act are no more suspect simply because they are defined in terms of representations that are prohibited rather than those that are permitted. We find, therefore, that Congress was within its power to limit the scope of legal services available under the LSCA.

2. Unconstitutional Conditions. Plaintiffs' second constitutional contention is that the program integrity rules contained in the final regulations unreasonably burden a grantee's ability to use nonfederal funds to engage in restricted activity. Because each of the provisions of the 1996 Act burdens protected rights of association and speech, say plaintiffs, the undue burden of the final rules amounts to an unconstitutional condition on the receipt of LSC subsidies.

Three Supreme Court cases provide the framework for evaluating plaintiffs' unconstitutional conditions claim. In Regan v. Taxation With Representation, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983), Taxation With Representation (TWR), a non-profit organization devoted to studying tax issues and lobbying for tax reform, challenged Section 501(c)(3) of the Internal Revenue Code, which provided that organizations engaged in lobbying could not receive tax-deductible contributions. See I.R.C. § 501(c)(3). TWR argued that § 501(c)(3) impermissibly conditioned the benefit of contribution deductibility on the relinquishment of the First Amendment right to lobby. See Taxation With Representation, 461 U.S. at 545, 103 S.Ct. 1997. Because this was not an instance where "Congress [had] discriminate[d] invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas," the Court

applied minimal scrutiny and upheld the law. Id. at 548, 103 S.Ct. 1997 (alteration and internal quotation marks omitted). Nevertheless, Justice Rehnquist's majority opinion noted, and a concurring opinion relied upon, the fact that the I.R.C. allowed § 501(c)(3) organizations to establish financially independent but wholly-controlled lobbying affiliates under I.R.C. § 501(c)(4) without compromising their eligibility for deductible contributions. See id. at 544, 103 S.Ct. 1997 (majority opinion); id. at 552-53, 103 S.Ct. 1997 (Blackmun, J., concurring) (concluding that § 501(c)(3) alone would be "constitutionally defect[ive]").

The next Term, the Court invalidated a condition denying federal public broadcasting funds to public stations that engage in editorializing. See F.C.C. v. League of Women Voters, 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984). The Court found that because a "noncommercial educational station that receives only 1% of its overall income" from the Corporation for Public Broadcasting (CPB) would be barred from editorializing, stations "ha[ve] no way of limiting the use of [their] federal funds to all noneditorializing activities, and, more importantly, [they are] barred from using even wholly private funds to finance editorial activity." Id. at 400, 104 S.Ct. 3106. The Court emphasized that Congress could cure the statute by amending it to allow stations "to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds." Id.

Finally, in Rust, 500 U.S. 173, 111 S.Ct. 1759 (1991), recipients of family planning funds under Title X of the Public Health Services Act challenged regulations prohibiting Title X recipients from engaging in abortion

counseling, referral, and any other activities advocating abortion as a means of family planning. In Rust, as in the instant case, "program integrity" regulations required separation of facilities, personnel and records between Title X providers and any medical provider dispensing abortion information. See id. at 180-81, 111 S.Ct. 1759. The Court observed that "[t]he Title X grantee can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds." Id. at 196, 111 S.Ct. 1759 (emphasis omitted). For their part, Title X "employees remain free . . . to pursue abortion-related activities when they are not acting under the auspices of the Title X project." Id. at 198, 111 S.Ct. 1759. Because grantees were not "effectively prohibit[ed] . . . from engaging in the protected conduct outside the scope of the federally funded program," this circumstance was different from that considered in League of Women Voters, and there was no unconstitutional conditions violation. Id. at 197, 111 S.Ct. 1759.

Taking these cases together, we infer that, in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression. Section 501(c)(3)'s prohibition on lobbying in Taxation With Representation was permissible because the organizations receiving the benefit of deductibility could undertake lobbying activities through a § 501(c)(4) affiliate. In League of Women Voters, on the other hand, the prohibition on editorializing by CPB grantees was invalidated

because the law left no adequate alternative avenue for the protected expression.

Notwithstanding Rust's considerable superficial similarity to this case, we think it is the least pertinent of these precedents. Without diminishing its potential importance to some grantees, the speech restriction in Rust was nonetheless very narrow; it was limited to speech at odds with the values Congress was seeking to advance through its grant program. As the Supreme Court noted in Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 833, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), discussing Rust, "When the government disburses public funds to private entities to convey a governmental message, it may . . . ensure that its message is neither garbled nor distorted by the grantee."

In these respects, Rust is unlike the present case. The restrictions here placed on grantees are not narrow; they are extremely broad. Grantees are prohibited outright from engaging in attempts to influence government's adoption of laws. Nor does the justification that prevailed in Rust — avoiding the distortion or dilution of the very government message advanced by the program — have any bearing here. For this program, unlike Title X in Rust, is not advancing any particular set of values that might be diluted or distorted if the forbidden speech were permitted. Here Congress has simply chosen to rule that organizations which accept LSC funds to finance their activities shall not engage in other types of activities. We do not think Rust compels the conclusion that program integrity rules modelled on those governing Title X necessarily allow adequate avenues for protected

expression in statutory or factual contexts where the burden on speech may be more significant or where the relationship between the burden and the government benefit may be more attenuated.

Our conclusion that the First Amendment tolerates this restriction on speech is influenced more by Taxation With Representation's approval of the restriction in lobbying by § 501(c)(3) organizations and by the suggestion in League of Women Voters that the prohibition in editorializing by CPB grantees would have been acceptable if the law allowed them adequate alternative avenues for expression through affiliates than by the holding of Rust. Nonetheless, Rust is consistent with these cases, and tends to support their suggestion that the program we consider here can withstand at least a facial challenge despite its broad restrictions on the speech of LSC grantees.

Plaintiffs contend that, notwithstanding the authority of these cases, the 1996 Act is unlawful. They point to the "immensely wasteful" program integrity requirements of separate offices, equipment, libraries and personnel that grantees must meet in order to be able to speak through affiliates. Appellants' Br. at 37. Plaintiffs allege that the revised program integrity rules — although virtually identical to those approved in Rust [5] — impose "extraordinary"

---

5. Under both Title X and the 1996 Act regulatory schemes, a grantee may provide restricted activities only if the restricted service provider is distinguished by (1) separate personnel; (2) separate accounting records; (3) physical separation; and (4) signs or other outward markers of separation. Compare 45 C.F.R. § 1610.8 with (Cont'd)

burdens that impermissibly impede grantees from exercising their First Amendment rights to associate with clients, to lobby, and to litigate. Id. The costs of compliance, they argue, are "so substantial" as to be prohibitive. Appellants' Reply Br. at 18. They argue further that the justification in Rust for requiring substantial separation between the program recipient and the affiliate — to avoid the risk of weakening or garbling the government's message — is not present here, as the government is not using its grantees to advocate a message. Thus, plaintiffs argue, there is no justification for requiring the degree of separation of affiliates that was upheld in Rust.

We find that plaintiffs' allegations are insufficient to sustain a facial challenge. It may be, as plaintiffs urge, that the program integrity rules will, in the case of some recipients, prove unduly burdensome and inadequately justified, with the result that the 1996 Act and the regulations will suppress impermissibly the speech of certain funded organizations and their lawyers. And it may be, as plaintiffs contend, that the program integrity requirements may prove especially burdensome in the context of legal services. We are unable to assess these contentions on the sparse record

---

(Cont'd)

42 C.F.R. § 59.9 (suspended 1993). Under both schemes, whether the funded and restricted programs are sufficiently separate is determined on a case-by-case basis. See 45 C.F.R. § 1610.8(3); Rust, 500 U.S. at 180-81, 111 S.Ct. 1759. In almost every respect, the burden of separation is identical under the two schemes. See LASH III, 145 F.3d at 1024 (noting that "[t]he regulations promulgated by the LSC to preserve the distinction between restricted and unrestricted organizations are nearly identical to the regulations upheld in Rust").

before us, and we need not assess them to decide this appeal. Any grantee capable of demonstrating that the 1996 restrictions in fact unduly burden its capacity to engage in protected First Amendment activity remains free to bring an as-applied challenge to the 1996 Act. But plaintiffs present little evidence to support their predictions regarding how seriously the 1996 Act will affect grantees generally, and they provide no basis for concluding that the program integrity rules cannot be applied in at least some cases without unduly interfering with grantees' First Amendment freedoms. It appears likely that LSC grantees with substantial non-federal funding can provide the full range of restricted activity through separately incorporated affiliates without serious difficulty. Plaintiffs have therefore failed to "establish that no set of circumstances exists under which the Act would be valid," and so their facial challenge must be rejected. Rust, 500 U.S. at 183, 111 S.Ct. 1759 (quoting United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)).

3. Viewpoint Discrimination. We turn finally to plaintiffs' claim that the 1996 Act discriminates against certain speech on the basis of viewpoint and is therefore unconstitutional even as applied to the use of federal monies. It appears that plaintiffs direct this argument against the lobbying provisions and the welfare reform provision of the Act.[6]

---

6. The plaintiffs' brief also suggests that the redistricting provision and abortion provision impermissibly discriminate on the basis of viewpoint. Brief for Appellants at 27. As noted above, however, plaintiffs did not challenge these provisions in the court below, and so arguments challenging their validity are not properly before us.

With respect to the lobbying provisions, the claim is misplaced. The classification established by these provisions is based on subject matter, not viewpoint. We think it clear that Congress may discriminate on the basis of the subject matter of grantees' expression, because such discrimination properly "confine[s the LSC program] to the limited and legitimate purposes for which it was created." Rosenberger, 515 U.S. at 829, 115 S.Ct. 2510. We thus find that the lobbying restrictions constitute valid limitations on the scope of the LSC program.

The legislation provision, for example, restricts LSC grantees from "attempt [ing] to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body." OCRAA, § 504(a)(4). While this language imposes a sweeping restriction on grantee activity, it burdens no particular viewpoint and favors neither speech in support of legislative action nor speech opposed. Because it prohibits the grantee from "attempt[ing] to influence the passage or defeat" of a legislative or constitutional initiative, the prohibition applies regardless whether the prohibited activity would have sought change or opposed change. The provision operates only to restrict LSC-funded entities from lobbying with respect to legislative decisions, regardless of viewpoint.

The agency adjudication provision similarly restricts grantees from "attempt [ing] to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability

and future effect." Id. at § 504(a)(3). We perceive nothing in this language that burdens one viewpoint more than another; the restriction permits grantees to participate on neither side of a rule-creating adjudicatory proceeding. Rather, the provision permissibly channels grantee program activity away from adjudicatory policymaking in a viewpoint-neutral manner.

The executive branch provision similarly forbids grantees from "attempt[ing] to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency." Id. at § 504(a)(2). We interpret this provision to define a limitation on program content, without favoring policy continuity over change or otherwise discriminating against any viewpoint. In the language of Rust, the provision does not suppress ideas but merely prohibits "a project grantee . . . from engaging in activities outside the project's scope." 500 U.S. at 194, 111 S.Ct. 1759.

The welfare reform provision of § 504(a)(16) is more obscure. It includes four categories of prohibited activities "involving an effort to reform a Federal or State welfare system" — initiating legal representation, and participating in litigation, lobbying, or rulemaking — with an exception relating to the legal representation or litigation prohibitions. Under the most natural reading of each of these provisions, three appear to prohibit the type of activity named regardless of viewpoint, while one might be read to prohibit the activity only when it seeks reform.

The litigation prohibition is clearly viewpoint neutral. It denies grant funds to an entity that "participates in any . . . way, in litigation . . . involving an effort to reform a . . . welfare system." § 504(a)(16). Litigation by definition has at least two sides, and one "participates" in the litigation regardless of which side one is on. If litigation occurs "involving an effort to reform a . . . welfare system," one "participates" in it whether one is on the side seeking reform or the side opposing it. Grantees are therefore prohibited not only from litigating in an effort to reform a welfare system, but also from intervening or filing amicus briefs in such litigation in opposition to proposed reforms. We therefore conclude that the basic prohibition on participating in litigation involving an effort to reform a welfare system is viewpoint neutral.

The same considerations apply to the prohibition on "lobbying" and "rulemaking" "involving an effort to reform a . . . welfare system." One "participates" in lobbying and rulemaking "involving an effort to reform" whether one's participation supports or opposes the reforms under consideration.

The disqualification of an entity that "initiates legal representation . . . involving an effort to reform a . . . welfare system" is perhaps less clear. One reading of this clause seems to prohibit only efforts aimed at reform. A person who intended to oppose reform might not see himself as covered by a prohibition on activity "involving an effort to reform." On another interpretation, the statute could be read to cover both support and opposition to reform. Under this interpretation, if some other person is making an effort to

reform the welfare system, one who initiates a legal representation intended to oppose that effort is engaging in activity that involves (i.e., concerns) an effort to reform the system.

Even if it involves some linguistic strain to read the provision this way, two factors persuade us to do so. First, subsection (a)(16) on welfare reform is one of a long string of prohibitions on activity related to reform efforts. All the others are clearly expressed in a manner that bars activity on either side of the issue. It is unlikely that, with respect to welfare and welfare alone, Congress intended to bar only pro-reform activity and not opposition to reform.[7] If the welfare provision were read to prohibit only activity that sought reform and not activity that opposed it, this would mean that Congress had acted with respect to welfare in a manner inexplicably at variance with the law's numerous parallel provisions. It makes far better sense, if the words of the statute permit, to interpret the welfare provision as consistent with those provisions.

Second, to read the welfare provision as viewpoint biased would render it unconstitutional. As we noted above, see supra at 763, courts should be reluctant to read statutes in a manner that renders them unconstitutional. If two readings

---

7. This possibility is rendered all the more unlikely by the fact that the legislative history shows a particular congressional concern to block LSC grantees from opposing welfare reform. See 142 Cong. Rec. H8179 (daily ed. July 23, 1996)(statement of Rep. Burton) ("The LSC is fighting the welfare reform plan in Wisconsin. . . . Why are taxpayers' dollars being used to fight the very things we think are important?").

are possible, the one that would preserve the statute is generally preferable. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988); Hooper v. California, 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895).

We are therefore constrained to read the basic limitations of the welfare provision of § 504(a)(16) as viewpoint neutral prohibitions on the specified activities, regardless whether the activities are undertaken to promote reform or to defeat it.

There is, however, another specification in the welfare provision that is inescapably viewpoint-biased. Subsection (a)(16) expressly provides that its prohibitions do not prevent a grantee from representing "an eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation" (the "suit-for-benefits exception"). According to this exception, representation of a client seeking a welfare benefit is permitted, but only if the representation will not involve any challenge to the propriety of any previously existing rule that led to the denial of benefits. The grantee thus could not argue that the rule that led to the denial of the client's benefits was unauthorized by the governing regulation, that the regulation was unauthorized by the statute, or that the regulation or statute was unauthorized by the Constitution. Such representation is permitted only if it includes no challenge to the underlying law.

It seems clear to us that this limitation on the suit-for-benefits exception is not viewpoint neutral. It accords funding to those who represent clients without making any challenge to existing rules of law, but denies it to those whose representation challenges existing rules. It clearly seeks to discourage challenges to the status quo. The provision thus discriminates on the basis of viewpoint, and requires us to decide whether this discrimination is permissible in the context of the LSCA.

The government's "[d]iscrimination against speech because of its message" is suspect under the First Amendment. Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 828, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (noting that such discrimination is "presumed to be unconstitutional"). Whether a subsidy that is dependent on viewpoint constitutes illegal discrimination presents a complex question, which is illuminated by three relevant recent Supreme Court holdings.

In Rust v. Sullivan, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991), the Court upheld regulations forbidding recipients of government funds for family planning from counselling or advocacy related to abortion. See id. at 203, 111 S.Ct. 1759.

In National Endowment for the Arts v. Finley, 524 U.S. 569, 118 S.Ct. 2168, 141 L.Ed.2d 500 (1998), the Court last term upheld a requirement that the NEA, in making grants for the arts based on excellence, also "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American people." Finley, 118 S.Ct. at 2171.

In Rosenberger, the Court struck down a provision in a program of governmental grants to support student publications that excluded from eligibility publications expressing a viewpoint on religion. See Rosenberger, 515 U.S. at 837, 115 S.Ct. 2510.

We assess the relevance of these precedents differently from our dissenting colleague. Judge Jacobs argues that Rust and Finley together establish the government's broad entitlement to discriminate on the basis of viewpoint in making financial grants. Viewpoint discrimination, he argues, is suspect only where, as in Rosenberger, the government seeks to promote a diversity of private speech. Judge Jacobs relies heavily on explanatory language in the Rust opinion, which was quoted by the Supreme Court in Finley:

> The Government can, without violating the Constitution, selectively fund a program . . . it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Rust, 500 U.S. at 193, 111 S.Ct. 1759; see also Finley, 118 S.Ct. at 2168.

Under Judge Jacobs's analysis, just as Congress may lawfully fund family planning services conditioned on the

grantee's not counseling on the availability of abortion, so Congress also may fund the legal representation of a welfare applicant conditioned on the grantee's not raising arguments that question the validity of any statute, regulation or governmental procedure pertaining to welfare.

We acknowledge that the words from Rust that Judge Jacobs cites seem on their face to support his view. But we doubt that these words can reliably be taken at face value. In seeking to understand how a judicial precedent in a relatively unexplored area of law bears on other undecided questions, it is often more instructive to look at what the Court has done, rather than at what the Court has said in explanation. Explanations that seem sound enough in the context of the facts for which they are devised often carry implications the court would never subscribe to if applied to other facts not in contemplation. See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399, 5 L.Ed. 257 (1821) (Marshall, C.J.) ("It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."); United States v. Rubin, 609 F.2d 51, 69 (2d Cir.1979) (Friendly, J., concurring) ("A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.' "); cf. CBS, Inc. v. American Soc'y of Composers, Authors & Publishers, 620 F.2d 930, 934- 35 (2d Cir.1980) (Newman, J.) ("[T]he safer course is to read judicial opinions as deciding only what they purport to decide.").

The quotation from Rust, for example, seems on its face to imply that Congress could lawfully fund institutions to study the nation's foreign or domestic policies, conditioned on the grantee's not criticizing, or advocating change in, the policies of the government. That would fall within the parameters of choosing "to fund one activity to the exclusion of [an]other." Congress would be "selectively fund[ing] a program . . . it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way." Nonetheless, we think it inconceivable that the Supreme Court that approved the Rust regulation would have intended its language to authorize grants funding support for, but barring criticism of, governmental policy.[8]

We think the resolution lies in the fact that different types of speech enjoy different degrees of protection under the First Amendment. "Expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' " NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (quoting Carey v. Brown, 447 U.S. 455, 467, 100 S.Ct. 2286, 65 L.Ed.2d

---

8. Concurring in the judgment in Finley, Justice Scalia did argue that the government can allocate subsidies "ad libitum, insofar as the First Amendment is concerned." Finley, 118 S.Ct. at 2184 (Scalia, J., concurring in judgment). This position was joined by only one other Justice, however. The majority left no doubt that the First Amendment "has application in the subsidy context," id. at 2179, and that a subsidy "aim[ed] at the suppression of dangerous ideas" would violate the First Amendment, id. at 2178 (quoting Regan v. Taxation with Representation, 461 U.S. 540, 550, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983)).

263 (1980)). The strongest protection of the First Amendment's free speech guarantee goes to the right to criticism government or advocate change in governmental policy. "[E]xpression of dissatisfaction with the policies of this country [is] situated at the core of our First Amendment values." Texas v. Johnson, 491 U.S. 397, 411, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). Criticism of official policy is the kind of speech that an oppressive government would be most keen to suppress. It is also speech for which liberty must be preserved to guarantee freedom of political choice to the people. For those reasons we think it clear that, notwithstanding Rust's semantic endorsement of Congress's right to fund one activity to the exclusion of another, the Supreme Court would not approve a grant to study governmental policy, conditioned on the grantee's not criticizing the policy.

In our view, a lawyer's argument to a court that a statute, rule, or governmental practice standing in the way of a client's claim is unconstitutional or otherwise illegal falls far closer to the First Amendment's most protected categories of speech than abortion counseling or indecent art. The fact that Congress can make grants that favor family planning over abortion, or that favor decency over indecency, in no way suggests that Congress may also make grants to fund the legal representation of welfare applicants under terms that bar the attorney from arguing the unconstitutionality or illegality of whatever rule blocks the client's success. Among the only directly effective ways to oppose a statute, regulation or policy adopted by government is to argue to a court having jurisdiction of the matter that the rule is either unconstitutional or unauthorized by law. The limitation on

the suit-for-benefits exception prohibits a legal services organization that has received LSC grant funds from making such an argument on behalf of a client, even though that argument may be necessary to establish the client's rights in precisely the representation for which the funding was granted.[9] Such a restriction is a close kin to those "calculated to drive 'certain ideas or viewpoints from the marketplace.' " Finley, 118 S.Ct. at 2179 (quoting Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 116, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991)). If the idea in question is the unconstitutionality or illegality of a governmental rule, the courtroom is the prime marketplace for the exposure of that idea. Cf. Cooper v. Aaron, 358 U.S. 1, 18, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1958) (stating the "basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution"). To forbid a lawyer from articulating that idea in the court proceeding effectively drives the idea from the marketplace where it can most effectively be offered.

The Supreme Court's discussion in Finley underscores the suspect nature of the limitation on the suits-for-benefits exception for a further reason. In Finley, considerations of "decency and respect" were merely to be taken "into

---

9. We do not agree with Judge Jacobs' view that the statute merely prohibits lawyers from taking on certain representations. As a practical matter, a lawyer often will not know in advance what arguments must be raised to counter those raised by the opposition as the litigation progresses. We think furthermore that Judge Jacobs overstates the ease with which a lawyer can withdraw from litigation that is in progress and underestimates the prejudice to the client that may result from such a withdrawal.

consideration." The Supreme Court stressed that the questioned provision offered "vague exhortation[s]" and "impose[d] no categorical requirement." Id. 118 S.Ct. at 2176, 2177. The NEA might still make grants notwithstanding indecency. The Court, in fact, seemed to imply that an absolute prohibition, of the sort "calculated to drive 'certain ideas or viewpoints from the marketplace,' " would have required a different result. Id. at 2176, 2179 (internal citation omitted). The limitation on the suit-for-benefits exception is just such an absolute prohibition: It muzzles grant recipients from expressing any and all forbidden arguments.

For these reasons, we believe that the suit-for-benefits exception is viewpoint discrimination subject to strict First Amendment scrutiny. Defendants offer no arguments why the provision can survive such scrutiny and we perceive none. We therefore conclude that the suit-for-benefits exception of § 504(a)(16) unconstitutionally restricts freedom of speech, insofar as it restricts a grantee, seeking relief for a welfare applicant, from challenging existing law.

The next question is which part of the statute should be found invalid as a result of the unconstitutionality of the viewpoint-based proviso to the suit-for-benefits exception. The four most likely candidates for invalidation are (1) the entire Act; (2) the entire subsection (a)(16) relating to welfare reform; (3) the entire suit-for-benefits exception; and (4) the proviso to the effect that an attorney suing for a client's benefits may not challenge existing law.

We quickly conclude that the first and second possibilities go too far. "A court should refrain from

invalidating more of [a] statute than is necessary." Alaska Airlines v. Brock, 480 U.S. 678, 683, 107 S.Ct. 1476, 94 L.Ed.2d 661 (1987) (internal quotation marks omitted). In our view, without this restriction, the 1996 Act will still "function in a manner consistent with the intent of Congress," id. at 685, 107 S.Ct. 1476 (emphasis omitted). Our finding of unconstitutionality affects only one tiny restriction in the statute, which can otherwise continue to function as intended. Subsection (a)(16) can also continue to bar activities "involving an effort to reform a . . . welfare system," as Congress intended, without the unconstitutional provision.

The more troublesome question is whether the invalid viewpoint-based restriction should result in the invalidity of the entire suit-for-benefits exception, or only of the proviso that bars a grantee in the course of a legal representation of an eligible individual from arguing to amend or challenge any existing law. We recognize a reasonable argument that the overall intent of the Act is so opposed to challenges to law that the intent of Congress would be better served by striking down the entire suit-for-benefits exception than by allowing a grantee lawyer representing a client to argue the invalidity of any existing rule of law.

On the other hand, because complex legislation represents an amalgam of different viewpoints and compromises, one might see the suit-for-benefits exception as an intentionally more measured provision, one recognizing that a lawyer engaged in the representation of a client must make the arguments necessary to secure the relief their client seeks. The proviso as drafted does not forbid grantee lawyers from challenging all laws — only those that were in existence

at the time of the initiation of the representation. Thus, notwithstanding its hostility to litigation seeking legal reform, Congress intentionally permitted challenges to law in the context of individual representation so long as the challenge addressed a law passed after the initiation of the representation.

Because it is unclear which alternative better carries out the intent of Congress, we think it best to invalidate the smallest possible portion of the statute, excising only the viewpoint-based proviso rather than the entire exception of which it is a part. This conclusion follows the Supreme Court's guidance that "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Buckley v. Valeo, 424 U.S. 1, 108, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976) (citation and internal quotation marks omitted); see also Regan v. Time, Inc., 468 U.S. 641, 653, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) ("[T]he presumption is in favor of severability."). We thus conclude that the viewpoint-based proviso barring grantee lawyers representing individuals from contesting the legality of an existing rule is severable from the overall suit-for-benefits exception. The exception permitting a grantee to "represent[ ] an individual eligible client [w]ho is seeking specific relief from a welfare agency" will survive our holding that the viewpoint-based proviso to the suit-for-benefits exception is unconstitutional.

We therefore direct the district court to enter a preliminary injunction barring enforcement of that part of

the suit-for-benefits exception of § 504(a)(16) that would make an entity ineligible for an LSC grant if, in the course of a representation of an individual client seeking specific relief from a welfare agency, that entity sought "to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." In all other respects, the statute will continue to function as written. Grantees will be barred (on penalty of losing their entitlement to grantee status) from engaging in any of the activities prohibited by § 504. They will be prohibited under § 504(a)(16) from initiating legal representation, or participating in any other way in litigation, lobbying, or rulemaking concerning "effort[s] [by anyone] to reform a Federal or State welfare system." On the other hand, grantees will be permitted to represent "an individual eligible client who is seeking specific relief from a welfare agency," regardless whether such representation includes arguments that seek "to amend or otherwise challenge existing law." § 504(a)(16).

Conclusion

The district court's denial of a preliminary injunction is reversed solely with respect to the limitation on the suit-for-benefits exception of § 504(a)(16). In all other respects, the district court's order denying a preliminary injunction is affirmed.

JACOBS, Circuit Judge, concurring in part, dissenting in part:

I agree with the conclusions of the majority opinion except insofar as it holds unconstitutional a critical proviso in a subsection of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 ("OCRAA"), Pub.L. No. 104-134, § 504(a)(16), 110 Stat. 1321, 1321-55 to 1321-56 (1996). That subsection

> (i) denies Legal Services Corporation ("LSC") funding to any entity "that initiates legal representation or participates in any other way in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system,"
>
> (ii) creates an exception for the representation of "an individual eligible client who is seeking specific relief from a welfare agency,"
>
> (iii) subject however to the proviso that bars LSC grantees from taking cases that "involve an effort to amend or otherwise challenge existing law."

The majority throws the section out of kilter by preserving the exception but striking the proviso, on the ground that under Rosenberger v. Rector & Visitors of the University of Virginia, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), the proviso amounts to viewpoint discrimination.

I respectfully dissent because:

(A) The proviso, which helps specify the type of representation that a grant recipient may undertake, is part of Congress's entirely appropriate — and necessary — specification of the services available in a program it created.

(B) The majority has not successfully identified a disfavored viewpoint of any person in any public forum. To the extent that this legislation funds a "viewpoint" at all, it is one that advocates the delivery of welfare benefits to claimants.

A. Program Definition

In creating a government program, Congress can of course specify the goods and services that will be provided and the goods and services that will be excluded. In so doing, Congress is permitted to fund the exercise of some constitutionally protected rights, but not others. See Rust v. Sullivan, 500 U.S. 173, 194-95, 111 S.Ct. 1759, 1773, 114 L.Ed.2d 233 (1991). Although Rosenberger curbs the government's power to fund some viewpoints to the exclusion of others, that limitation operates only when the government creates a limited public forum for the expression of diverse viewpoints. A grantee of the Legal Services Corporation is not a public forum or the participant in a public forum in which it is invited to contribute its point of view; it is a contractor furnishing services that the government wants provided, and in that way it resembles the recipients of Title X funds in Rust, and any of the private agencies that carry

out myriad other government programs that have limited and specified purposes.

1. Statutory Authority

From its inception, the purpose of the LSC has been to fund individual client services for indigent persons with legal problems. See 42 U.S.C. § 2996 (1994). Over the years, Congress has shaped and clarified the kind of legal services that LSC and, in some cases, its grant recipients may fund:

- No "fee-generating" cases. See 42 U.S.C. § 2996f(b)(1) (1994). No felony cases. See 42 U.S.C. § 2996f(b)(2) (1994).

- No civil actions challenging a criminal conviction. See 42 U.S.C. § 2996f(b)(3) (1994).

- No cases seeking "to procure a nontherapeutic abortion." See 42 U.S.C. § 2996f(b)(8) (1994).

- No school desegregation cases. See 42 U.S.C. § 2996f(b)(9) (1994).

- No cases involving the Military Selective Service Act, 50 App. U.S.C. § 451 et seq. See 42 U.S.C. § 2996f(b)(10) (1994).

- No cases involving assisted suicide. See 42 U.S.C.A. § 2996f(b)(11) (West Supp.1998).

- No litigation (or other activity) regarding "the timing or manner of the taking of a census." See OCRAA § 504(a)(1), 110 Stat. at 1321-53.

- No class action litigation. See id. § 504(a)(7), 110 Stat. at 1321-53.

- No legal assistance to certain classes of aliens. See id. § 504(a)(11), 110 Stat. at 1321-54 to 1321-55.

- No litigation on behalf of someone incarcerated. See id. § 504(a)(15), 110 Stat. at 1321-55.

- No litigation on behalf of persons being evicted from public housing for selling drugs. See id. § 504(a)(17), 110 Stat. at 1321-56.

The majority opinion correctly rejects the constitutional challenges that the plaintiffs make to several of these program-shaping provisions. See Majority at [page 764] (rejecting challenge to prohibition on fee-generating cases); id. at [pages 764-67] (rejecting unconstitutional condition challenge to all the § 504 restrictions).

The restriction that § 504(a)(16) imposes — on the use of LSC money to fund political agitation concerning welfare policy — is another effort by Congress to define the types of services that LSC grantees may provide and to channel all the government's funds (without substitution or displacement) to those services and no others. The exception for advocacy in suits to collect welfare benefits, as limited by the proviso barring expenditures to challenge existing law, serves the same purpose and operates in the same way.

Appendix A

The proviso on welfare litigation is not (as the majority appears to believe) an effort to weed out a certain class of arguments in cases in which LSC-funded lawyers appear. The statute nowhere contemplates or requires that an LSC-funded lawyer appear in a case in which he or she must forbear from challenging a welfare statute on meritorious constitutional grounds; to the contrary, the proviso says that a lawyer or grantee may not take on such a representation in the first place. There is nothing remarkable about this. Lawyers often turn down representations that they cannot fulfill, either by reason of conflict or otherwise (such as availability of time and resources, or lack of expertise). For example, a public interest lawyer cannot file a claim for job discrimination against a charitable agency she organized or has represented; and a public interest lawyer representing a plaintiff who is pressing for school vouchers cannot be expected to take on a representation that entails the argument that school vouchers are illegal or unconstitutional. The LSC's authorizing legislation as well as rules of legal ethics prohibit a lawyer from undertaking a representation in which that lawyer would be barred from pursuing a potentially fruitful avenue of argument.[1] A grantee (or a lawyer

---

1. See 42 U.S.C. § 2996e(b)(3) (1994) (requiring the LSC to "ensure" that the activities it finances are carried out in accordance with attorneys' ethical obligations); 42 U.S.C. § 2296f(a)(1) (1994) (requiring the Corporation to "insure the maintenance of the highest quality of service and professional standards"); Model Rules of Professional Conduct Rule 1.1 (1995) (requiring attorneys to utilize the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"); id. Rule 1.2 cmt. 5 (noting that a "client may not be asked to agree to a representation so limited in

(Cont'd)

employed by a grantee) is ethically obliged to decline such a case, and may refer the client to a lawyer who can handle it, see Velazquez v. Legal Servs. Corp., 985 F.Supp. 323, 343 (E.D.N.Y.1997), and in some instances, the client will be referred to an affiliated entity, see Majority at [pages 761-62].

The majority argues that as a "practical matter" an attorney will "often" not know what arguments may be needed in a given representation. See Majority at [page 771 n. 9]. Since this is a facial challenge, however, this Court may not base its invalidation of this statute on a hypothetical set of circumstances, even one it believes will "often" occur. See Majority at [page 762] (Plaintiffs "must establish that no set of circumstances exist under which the Act would be valid.") (quoting Rust, 500 U.S. at 183, 111 S.Ct. 1759 (emphasis added)). Moreover, as the majority points out, the LSC does not fund a traditional, all-encompassing lawyer-client relationship. It has always operated under significant restrictions, and it is required to advise prospective clients of these limitations. So there is therefore "no reason to fear that clients will detrimentally rely on their LSC lawyers for a full range of legal services," Majority at [page 764], such as help in mounting a Constitutional challenge to a welfare statute.

(Cont'd)
scope as to violate Rule 1.1"); id. Rule 1.2 cmt. 4 ("Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles."); id. Rule 1.16(a)(1) (barring attorney from taking case that would result in violation of any ethical rule); id. Rule 1.16 cmt. 1 ("A lawyer should not accept representation in a matter unless it can be performed competently, promptly . . . and to completion.").

2. Supreme Court Authority

On its face, this statute funds a program that provides certain services, and the restriction found in § 504(a)(16) (together with its exception and its proviso) prohibits grantees from rendering services that fall outside the scope of the program. The Supreme Court has recognized the undoubted power of Congress to do this. See Rust, 500 U.S. at 192-94, 111 S.Ct. at 1771-73; Harris v. McRae, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980).

In Rust, the Court considered a section of the Public Health Service Act prohibiting the use of funds appropriated for family-planning services "in programs where abortion is a method of family planning." Rust, 500 U.S. at 178, 111 S.Ct. at 1764-65 (quoting 42 U.S.C. § 300a-6). The Court upheld the constitutionality of that prohibition because it ensured that grantees did not engage in activities outside the scope of the program:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Id. at 193, 111 S.Ct. at 1772. The program definition upheld in Rust is therefore "not the case of a general law singling

out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." Id. at 194-95, 111 S.Ct. at 1773. Of the present case it is possible to say in paraphrase of Rust that the scope of the LSC project is the funding of certain individual client services, that the law does not single out any "disfavored group," and that the government has simply "refus[ed] to fund activities, including speech, which are specifically excluded from the scope of the project funded."

The error of the majority opinion arises from its inapt (and complete) reliance on Rosenberger, a case in which the purpose of the government program was to fund the expression of politically diverse views. The University of Virginia was defraying part of the printing costs of student publications, but denied funding to journals that promoted a religious viewpoint. The Supreme Court held that such content-based funding decisions are impermissible when the expenditure of funds is intended to facilitate private speech and thus to "encourage a diversity of views from private speakers." Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 834, 115 S.Ct. 2510, 2519, 132 L.Ed.2d 700 (1995). The holding of Rosenberger is that when government subsidizes private speakers to express their own viewpoints, it cannot discriminate among potential recipients on the basis of viewpoint. The LSC, which supports a defined program of legal representation to indigent clients, of course does not underwrite the expression of the private speech or viewpoints of its grantees or their lawyers, or (for that matter) their clients.

Rosenberger does not impair the principle — explicitly announced in Rust and not implicated by the facts of Rosenberger — that when the government funds specific services it deems to be in the public interest, it may require grantees to get with its program. The majority's surprising, short answer to this argument is that the passage from Rust on which I rely cannot "reliably be taken at face value." Majority at [page 770]. This approach to Supreme Court opinions is not one previously employed in this Circuit. I think the Supreme Court meant what it said, and that it bears repeating:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

Rust, 500 U.S. at 193, 111 S.Ct. at 1772. Recently the Supreme Court itself invoked Rust — and quoted that passage — to uphold restrictions on the disbursement of funds by the National Endowment for the Arts. See National Endowment for the Arts v. Finley, 524 U.S. 569, __, 118 S.Ct. 2168, 2179, 141 L.Ed.2d 500 (1998) (quoting Rust, 500 U.S. at 193, 111 S.Ct. at 1772).

There is one sure fire way to find out whether the Supreme Court meant what it said in Rust and Finley, and

now that the majority has split with the Ninth Circuit on this issue, we may not have long to wait. Relying on Rust, the Ninth Circuit rejected a viewpoint discrimination challenge to the LSC restrictions that are at issue on this appeal. See Legal Aid Soc'y of Hawaii v. Legal Servs. Corp., 145 F.3d 1017 (9th Cir.), cert. denied, __ U.S. __, 119 S.Ct. 539, 142 L.Ed.2d 448 (1998). Justice White (part of the Rust majority), sitting by designation on the Ninth Circuit, wrote: "Like the Title X program in Rust, the LSC program is designed to provide professional services of limited scope to indigent persons, not create a forum for the free expression of ideas." Id. at 1028.

In an attempt to distinguish the Rust opinion from the Rust result, the majority offers the hypothetical of government-financed think tanks commissioned to study American foreign policy, but forbidden to criticize it. This hypothetical is far removed from any program to furnish legal services; tellingly, it looks very much like the University of Virginia's student-publication program in Rosenberger.

A closer analogy would be presented if Congress (i) decided to out-source the advice that the Internal Revenue Service now gives taxpayers on how much taxes they owe and how much they can shelter or deduct, (ii) underwrote accountants and tax lawyers to counsel and represent qualifying middle-class taxpayers, and then (iii) discovered that the outside contractors were expending appreciable grant resources on agitation for tax reform along lines favored by the contractors and deemed by them to be in the interest of the middle classes. Congress could certainly plug that drain by specifying that the representation be limited to achieving

the accurate computation of amounts due under the present tax code, and by barring advocacy aimed at, inter alia, tax reform, establishing the single tax or flat tax, or organizing constitutional litigation to challenge particular revenue provisions or the ratification of the 16th Amendment. Congress could do this, and if it did, the legislation would look like the restriction that the majority here holds unconstitutional.

The LSC restrictions, like my hypothetical statute to assist taxpayers, is not a promotion of advocacy for the good old status quo, or a suppression of a point of view. Both programs channel money to an identified public purpose, which is the administration of a complex existing statute so that everyone can get what the statute provides. I cannot imagine a more viewpoint-neutral legislative scheme.

B. Viewpoint Discrimination

Considering that the majority has invalidated a statute on the ground that it constitutes impermissible viewpoint discrimination, it is odd that the majority only vaguely articulates the viewpoint that is supposedly disfavored by this legislation and (reciprocally) never states what viewpoint is favored. The fact is, the LSC subject-matter restrictions do not lend themselves to analysis in these terms. One subsection bars funding "to provide legal assistance in civil actions to persons who have been convicted of a criminal charge . . . for the purpose of challenging the validity of the criminal conviction." 42 U.S.C. § 2996f(b)(3) (1994). Does the statute thereby "discriminate" against the "viewpoint" that prisoners have constitutional rights? Another provision

bars funding "to provide legal assistance with respect to any proceeding or litigation relating to the desegregation of any elementary or secondary school." 42 U.S.C. § 2996(b)(9) (1994). Does the statute thereby "discriminate" against the "viewpoint" that schools ought to be desegregated? If limitations on classes of cases eligible for representation by LSC-financed lawyers constitute impermissible discrimination against the people who may want to advance theories in such cases, then it is hard to see how any of the many statutory limitations on LSC funds are constitutional.

By the same token, I cannot agree that the statute promotes one favored view over others in a supposed public forum. Whose viewpoint? What forum? According to the majority opinion: the government-funded lawyers possess the protected expressive interest; and the public forum is the courtroom (an idea that may come as a surprise to trial judges). See Majority at [pages 770-71]. But the proviso stricken by the majority bars representation in lawsuits. The viewpoints of litigating lawyers in a courtroom cannot matter for present purposes, because (among other things) the advocacy of a lawyer in litigation is at the service of the client; it would be inaccurate (and unfair) to assume that a lawyer's advocacy expresses that lawyer's personal view on politics or morals. See Model Rules of Professional Conduct Rule 1.2(b) (1995).

It also cannot be said that the proviso disfavors the speech of the clients; the only litigants who are funded are those who seek benefits. There are certainly people on the other side of welfare issues, such as those who favor narrowing welfare eligibility, or reduced benefits, or

abolition of the welfare system. But the statute gives them nothing. Where then is the viewpoint discrimination, even if one assumed (as I do not) that the LSC makes every courtroom into a public forum?

The statute bars constitutional and other challenges to the welfare laws, but it certainly does not fund the view that the welfare laws are constitutionally impregnable. The proviso invalidated by the majority does not promote or favor any message. It lays down specifications for services to be provided to favored beneficiaries. And it excludes some of the most expensive services — constitutional litigation and statutory challenges — in the same way that the statute elsewhere bars the expenditure of LSC funds for class actions. In excluding these expensive initiatives, the statute maximizes the expenditure of limited available funds for less expensive benefit-collection lawsuits.[2] Congress is able to do that; and a statute in which Congress does that should be able to withstand a facial challenge.

---

2. By striking the proviso, the majority essentially appropriates money for the precise category of expensive (and often politically oriented cases) that Congress chose not to fund.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED DECEMBER 22, 1997

Carmen VELAZQUEZ, Wep Workers Together!, Community Service Society of New York, Inc., New York City Coalition to End Lead Poisoning, Centro Independiente De Trabajadores Agricolas, Inc., and Greater New York Labor-Religion Coalition, on behalf of all similarly situated individuals, organizations and their members; namely, individuals and organizations who are, or wish to be, represented by lawyers employed by entities receiving funds from the Legal Services Corporation, and who wish to assert legal claims as members of a class, or to benefit from some other legal advocacy activity proscribed by Pub.L. 104-208; Farmworkers Legal Services of New York, Inc., on behalf of itself, and on behalf of all similarly situated not-for-profit legal services entities; namely, organizations who wish to be eligible to receive funds from the Legal Services Corporation, and who wish to be free to engage in legal advocacy activities that are proscribed by Pub.L. 104-208; Lucy A. Billings, Peggy Earisman, Olive Karen Stamm, Jeanette Zelhof, Elisabeth Benjamin, Jill Ann Boskey, and Lauren Shapiro, on behalf of each, and on behalf of all similarly situated individuals; namely, attorneys employed or formerly employed by entities receiving funds from the Legal Services Corporation who wish to be free to represent indigent individuals in class actions, and to engage in other attorney-client activities that are proscribed by Pub.L. 104-208;

and

Appendix B

Andrew J. Connick, Councilmember C. Virginia Fields, Councilmember Guillermo Linares, Councilmember Stanley Michels, Councilmember Adam Clayton Powell, IV, Senator Lawrence Seabrook, and Assemblyman Scott M. Stringer, on behalf of themselves and all similarly situated individuals; namely, individuals who have provided public or private nonfederal funding to entities that also receive funds from the Legal Services Corporation, and who wish these funds to be used for legal advocacy activities that are proscribed by Pub.L. 104-208, Plaintiffs,

v.

LEGAL SERVICES CORPORATION, Defendant.

No. 97-CV-182 (FB).

United States District Court,
E.D. New York.

Dec. 22, 1997.

* * *

MEMORANDUM & ORDER

BLOCK, District Judge.

Plaintiffs challenge the constitutionality of certain provisions of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub.L. No. 104-134, § 504, 110 Stat. 1321 (1996), which were re-enacted by the Omnibus Consolidated Appropriations Act of 1997, Pub.L. No. 104-

208, § 502, 110 Stat. 3009 (1996) (hereinafter collectively referred to as the "Act"), as implemented by regulations which were issued subsequent to the commencement of this lawsuit. The Act prohibits attorneys and organizations that receive federal monies from defendant Legal Services Corporation ("LSC") from engaging in a large number of activities (the "prohibited activities"), such as lobbying, challenging welfare reform legislation, and participating in class action litigation. The Act also provides that such LSC-funded attorney or entity ("recipients") cannot engage in any of the prohibited activities even if funding for the prohibited activity were to come from non-federal sources. However, implementing regulations issued by the LSC after the commencement of the litigation allow recipients to engage in the prohibited activities by affiliating with legal services organizations that do not receive any federal monies from the LSC.

Presently before the Court is plaintiffs' motion for preliminary injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure.[1] Plaintiffs contend that the Act's restrictions, as implemented by the LSC's regulations, are facially violative of the First and Fifth Amendment rights of recipients, as well as attorneys for, clients of, and donors to, those recipients.[2] The Court

---

1. On March 24, 1997, the Court held a preliminary injunction hearing ("Hearing") and entertained oral argument from the parties.

2. Plaintiffs' amended complaint seeks class certification for each of these groups. The parties have agreed that the issue of class certification need not be decided pending the Court's determination of the preliminary injunction motion.

disagrees and, regarding the implementing regulations, holds that they are a permissible construction of the Act and are appropriately tailored to the Government's legitimate interests. The Court accordingly denies the motion for preliminary injunctive relief.

BACKGROUND

I. The Legal Services Corporation & The Statutory Restrictions

Congress created the LSC in 1974 in response to, inter alia, the "need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program." 42 U.S.C. § 2996(2). The LSC is a nonprofit corporation charged with distributing federal funds, in the form of grants, to recipients nationwide that provide legal assistance to low-income individuals. In 1995, LSC recipient organizations served approximately 1,900,000 indigent clients, encompassing over 1,700,000 matters, which benefitted almost 5,000,000 people living in poverty.[3] The LSC has thus been described as "the primary vehicle for insuring that the poor are included in this nation's legal system."[4] Recipients generally rely on both LSC funds and monies raised from a variety of public and private sources[5] to finance their operations.

---

3. S. Rep. 104-392, at 13 (1996).

4. Id.

5. These sources include: state and local grants, IOLA (Interest on Lawyers' Accounts) programs, and private donations.

Appendix B

Despite the success of the LSC in meeting the legal needs of the poor, controversy has surrounded the LSC since its inception. This controversy has focused on the extent to which recipients should be limited in their use of LSC funds. At one end of the spectrum, critics of the LSC charge that recipients often use federal funds to advance activist agendas, and that broad limitations are necessary to ensure that LSC funds are spent to meet the basic legal needs of the poor. At the other end, opponents of such restrictions argue that activist litigation is necessary to assist impoverished individuals, and that the vast majority of LSC funds are used to help the poor in so-called "basic" legal proceedings.

In response to this debate, Congress has repeatedly placed restrictions on the permissible uses of federal funds by recipient organizations. For example, the 1974 Act prohibited the use of LSC funds by any recipient to provide legal assistance in any case seeking to obtain a nontherapeutic abortion. 42 U.S.C. § 2996f(b)(8). The 1974 Act and implementing regulations also restricted recipients from participating in the following areas: political activity, criminal proceedings, training, school desegregation, lobbying, violations of the Military Selective Service Act, and fee-generating cases. 42 U.S.C. §§ 2996f(b)(1)-(4), (6)-(10). In 1989, the LSC extended the restrictions to include redistricting cases. 45 C.F.R. § 1632. The present dispute arises from the latest round of congressional debate and compromise, which resulted in continued funding for the LSC, but with an additional set of restrictions on recipients of LSC funds.

Appendix B

Although restrictions on LSC funds have been commonplace since Congress created the LSC, the Act is unique because the restrictions apply, for the first time, to recipient activities that are supported by non-federal public funds. Previously, recipients were allowed to use non-federal funds from public sources as they pleased so long as accounting practices documented the segregation of federal and non-federal funds.[6] Thus, while the former statute provided that "[n]o funds made available by [LSC] may be used" for any of the prohibited activities, 42 U.S.C. § 2996f(b), the new statute provides that "[n]one of the funds appropriated [by the LSC] may be used to provide financial assistance to any [recipient]" that engages in any of the prohibited activities. Act § 504(a). Furthermore, the new statute states that recipients are free to "us[e] funds received from a source other than the Legal Services Corporation to provide legal assistance . . . except that such funds may not be expended by recipients for any purpose prohibited by this Act . . . ." Act § 504(d)(2)(B).

---

6. Although Congress has never before prohibited recipients from using public non-LSC funds — such as grants from state and local entities and IOLA funds — to engage in prohibited activities, Congress had previously extended some of the restrictions to activities funded with private donations. 42 U.S.C. § 2996i(c); 45 C.F.R. pts. 1610, 1627 (1995). Despite this curious dichotomy, plaintiffs do not challenge the restrictions on private funds, contending that those prior restrictions on the use of private funds were insignificant since public funds constitute the "overwhelming majority" of recipients' non-LSC funds. Memorandum of Law In Support of Motion for Preliminary Injunction at 3 n. 2. Therefore, the Court's reference herein to "non-LSC" funds refers to public non-LSC funds.

Appendix B

Plaintiffs' amended complaint challenges the constitutionality of the following prohibited activities set forth in the Act:[7]

> None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any [recipient]:
>
> > (2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency [hereinafter "executive order provision"];
> >
> > (3) that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect [hereinafter "agency provision"];
> >
> > (4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure

7. Some of the restrictions are new; some were contained in prior statutes, such as lobbying. Act § 504(a)(2)-(4); 42 U.S.C. § 2996f(a)(5).

of the Congress or a State or local legislative body [hereinafter "legislation provision"] [subsections (2), (3), and (4) will be referred to collectively as the "lobbying provisions"];

(5) that attempts to influence the conduct of oversight proceedings of the [LSC] or any person or entity receiving financial assistance provided by the Corporation [hereinafter "LSC oversight provision"];

(7) that initiates or participates in a class action suit [hereinafter "class action provision"];

(11) that provides legal assistance for or on behalf of [certain] alien[s] [hereinafter "aliens provision"];[8]

(12) that supports or conducts a training program for the purpose of advocating a particular public policy or encouraging a political activity, a labor or antilabor activity, a boycott, picketing, a strike, or a demonstration . . . [hereinafter "training provision"];

---

8. The Act sets forth a series of exceptions, such as lawfully admitted aliens who are permanent residents. See Act § 504(a)(11)(A)-(F).

(13) that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees [hereinafter "attorneys' fees provision"];

(15) that participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison [hereinafter "incarcerated client provision"];

(16) that initiates legal representation or participates in any other way . . . involving an effort to reform a Federal or State welfare system . . . [hereinafter "welfare reform provision"];

(18) unless such person or entity agrees that [it] will not accept employment resulting from in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action . . . [.] [hereinafter "solicitation provision"] . . . .

Act §§ 504(a)(2)-(5), (7), (11)-(13), (15)-(16), (18).

Appendix B

II. Evolution of Regulations Establishing Program Integrity Requirements Governing Alternative Channels for Engaging in Prohibited Activities

A. The Nature of the Regulations at the Time of LASH I

It is well-settled that the LSC has the power to promulgate rules and regulations to implement the Act. See Act § 503(b) ("the [LSC] shall promulgate regulations to implement a competitive selection process for the recipients"); 42 U.S.C. § 2996g(e) (requiring the LSC to publish in the Federal Register "all its rules, regulations, guidelines, and instructions"). Although the LSC was established as a federally-chartered nonprofit corporation of the District of Columbia rather than as an agency, Congress has manifested its intent to treat the LSC as a federal agency for regulatory purposes. See Texas Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685, 690-91 (D.C.Cir.1991) ("We conclude that the Act clearly grants both general and specific rulemaking powers to [the] LSC . . . ."). In light of the fact that the Act's restrictions now apply to non-LSC funds, the LSC recognized in the preamble to the first set of regulations passed after the Act that new regulations were necessary:

> [These regulations] incorporate [the restrictions imposed by the [Act], which apply to both a recipient's LSC funds and its non-LSC funds. Past appropriations acts have applied restrictions contained in those acts only to the funds appropriated thereunder. In contrast, the Act]

> prohibits LSC from funding any recipient that engages in certain specified activities or that fails to act in a manner consistent with certain [of the Act's] requirements.

61 Fed.Reg. 41,960, 41,960 (Aug. 13, 1996). Central to the regulations was the section providing that "[a] recipient may not use non-LSC funds for any purpose prohibited by the LSC Act or for any activity prohibited by or inconsistent with section 504 . . . ." 45 C.F.R. § 1610.3 (1996).

On December 2, 1996, the LSC promulgated a revised set of regulations, 61 Fed.Reg. 63,749, which included a new regulation entitled "Transfers of recipient funds." It provided that when a recipient transferred any funds, whether from LSC or non-LSC sources, the prohibitions on use of the funds would continue to apply to those transferred funds. 45 C.F.R. § 1610.7 (1996). Comments accompanying the revised regulations explained that applying the restrictions to transferred non-LSC funds was necessary "because otherwise recipients would be able to avoid the conditions on their non-LSC funds by simply transferring the funds." 61 Fed.Reg. 63,749, 63,752 (1996).

These new and revised regulations left in place a long-standing LSC regulation entitled "Interrelated Organizations," 50 Fed.Reg. 49,276, 49,279 (Nov. 29, 1985), which addressed the circumstances under which another organization would be deemed "controlled" by a recipient. The interrelated organizations regulation stated that "[f]unds held by an organization which . . . is controlled by . . . a recipient . . . are subject to the same restrictions as if the

funds were held by the recipient." Id. at 49,279-80. The regulation posited eight non-exclusive factors to be weighed to determine whether control exists.[9] The Act's extension of restrictions to non-LSC funds placed heightened importance on the interrelated organizations policy since non-LSC funds of any organization that was "controlled" by a recipient were subject to all of the Act's statutory restrictions.

B. The Decision in LASH I

This Court is not the first federal forum to pass on the constitutionality of the Act as implemented by LSC regulations. On February 14, 1997, a federal district court for the District of Hawaii issued an order granting in part and denying in part the plaintiffs' request for preliminary injunctive relief. Legal Aid Society of Hawaii, et al. v. Legal Servs. Corp., 961 F.Supp. 1402 (D.Haw.1997) (Kay, J.) (hereinafter referred to as "LASH I").

---

9. These factors were: "(a) Extent and pattern of any overlap of officers, directors, or other managers among organizations; (b) Contractual and financial relationships; (c) History of relationships among the organizations; (d) Close identity of interest; (e) One organization has become a mere conduit, 'incorporated pocketbook,' or 'straw' party for another whether or not there was an attempt to work an injustice or promote a fraud; (f) Funds are solicited by a separate entity in the name of and with the expressed or implicit approval of the recipient . . .; (g) A recipient transfers resources to another entity that holds these resources for the benefit of the recipient; and, (h) A recipient assigns functions to an entity whose funding is primarily derived from sources other than public contributions." Audit and Accounting Guide for Recipients and Auditors § 1-7, 50 Fed.Reg. 49,276, 49,279 (1985).

Appendix -B

The LASH I court resolved the preliminary injunction issue through a two-part analysis. First, the court determined the threshold issue of which of the challenged restrictions implicated constitutional rights, since the "sine qua non of [prevailing on a claim of infringement on constitutional rights] is proving that the restrictions at least implicate Plaintiffs' constitutional rights." LASH I, 961 F.Supp. at 1408. The court then considered whether the restrictions implicating constitutional rights actually amounted to constitutional violations. Id. at 1411. The parties before this Court agree that the two-part framework adopted by the LASH I court was appropriate. See Pl. Supp. Mem. of Law at 3; Def. Supp. Mem. of Law at 1 n. 2. The court in LASH I concluded that plaintiffs had a probability of success on the merits in respect to all but three of the restrictions, which it determined did not implicate constitutional rights.

In the first phase of its analysis, the LASH I court examined the "laundry list" of constitutional rights plaintiffs argued were implicated by the Act's restrictions. 961 F.Supp. at 1402. The court concluded that First Amendment rights to lobby, to associate, and to meaningful court access were implicated by all but three of the challenged restrictions. Specifically, the right to lobby was implicated by the executive order provision, the agency provision, the legislation provision, and the welfare reform provision, id. at 1408 (Act § 504(a)(2)-(4), (16));[10] the rights of association

10. The LASH I court also concluded that a restriction on participation in reapportionment cases implicated the right to lobby. Id. (Act § 504(a)(1)). Plaintiffs in this case have not challenged that provision. The Court also notes that, although apparently not challenged in LASH I, the LSC oversight provision, Act § 504(a)(5), also implicates the right to lobby for the same reasons as those articulated by LASH I.

and to meaningful court access were implicated by the training provision and the incarcerated client provision. Id. at 1409-10 (Act § 504(a)(12), (15)).[11]

The LASH I court concluded, however, that the aliens, class action, and attorneys' fees provisions did not implicate constitutional rights. The aliens provision did not implicate such rights because "[i]f Congress in its near plenary power over aliens decides that legal aid associations and their lawyers should not represent them, that decision should not be disturbed." Id. at 1410. As for the class actions provision, the LASH I court concluded that adopting plaintiffs' position would in effect constitutionalize Rule 23 of the Federal Rules of Civil Procedure, which it found "imprudent . . . absent any appellate precedent." Id. Finally, in respect to the attorneys' fees provision, the LASH I court concluded that "[p]laintiffs do not cite any authority that fee-shifting provisions violate Due Process or implicate the First Amendment," and that "because the provision does not implicate a suspect class, under Equal Protection the restriction need only pass rational basis which it clearly does." Id. at 1411.

Having found that all but three of the challenged restrictions implicated constitutional rights, the LASH I court proceeded to determine whether those restrictions, as implemented by LSC regulations, "not only implicate the First Amendment but whether they also impinge the First Amendment." Id. The court's analysis of the constitutional

---

11. The LASH I court also determined that rights to meaningful court access and to associate were implicated by the restriction, not challenged by plaintiffs in this case, on representation of persons allegedly involved in illegal drug activity in public housing eviction proceedings. Id. (Act § 504(a)(17)).

issue focused on the regulations promulgated by the LSC rather than the restrictions, since those regulations affected the ability of recipients to engage in activities prohibited by the Act through affiliate organizations. The court stated that "the dispositive factor . . . is whether the restrictions [leave] open adequate channels for speech. . . . [T]herefore, the Plaintiffs' likelihood of success rests on their ability to prove that the LSC restrictions prevent the organizations and lawyers from voicing their un-subsidized opinions." Id. at 1414.

The LASH I court examined the trilogy of leading Supreme Court cases on unconstitutional conditions — Rust v. Sullivan, 500 U.S. 173, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); FCC v. League of Women Voters, 468 U.S. 364, 104 S.Ct. 3106, 82 L.Ed.2d 278 (1984); and Regan v. Taxation with Representation, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) — and focused its analysis on a comparison between the LSC regulations and the regulations upheld by the Supreme Court in Rust. The Rust case originated from the enactment in 1970 of Title X to the Public Health Service Act, "which provides federal funding for family-planning services." 500 U.S. at 178, 111 S.Ct. at 1764. The regulations at issue in Rust ("Rust regulations") were promulgated in 1988 pursuant to a provision requiring that " '[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.' " Id. (quoting 42 U.S.C. § 300a-6).[12] The

12. As noted, the statute at issue in the present case provides, in almost identical language, that: "None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any recipient that [engages in the prohibited activities]." Act § 504(a).

Supreme Court noted "three principal conditions on the grant of federal funds for Title X projects" created by the regulations: "[(1)] a Title X project may not provide counseling concerning the use of abortion as a method of family planning . . . [(2)] a Title X project [may not] engag[e] in activities that encourage, promote or advocate abortion as a method of family planning . . . [and (3)] Title X projects [must] be organized so that they are physically and financially separate from prohibited abortion activities." Id. at 179-80, 111 S.Ct. at 1764-65 (internal quotations omitted).

Although the plaintiffs in Rust raised several grounds for their challenge to the Title X regulations, most pertinent to the present case is the Rust Court's disposition of the claim that the Title X regulations were impermissible "because they condition the receipt of a benefit . . . on the relinquishment of a constitutional right." Rust, 500 U.S. at 196, 111 S.Ct. at 1773. The Supreme Court summarized the unconstitutional conditions doctrine as follows:

> [O]ur "unconstitutional conditions" cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.

Id. at 197, 111 S.Ct. at 1774. The Court upheld the regulations on Title X projects because the regulations "do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such

activities separate and distinct from Title X activities." Id. at 196, 111 S.Ct. at 1773.

The Title X regulations governing the separateness of projects engaging in restricted activities, referred to as "program integrity" requirements, mandated that to conduct prohibited abortion counseling, the grantee had to maintain separate facilities, personnel, and records for the prohibited activity. The Government defended the program integrity requirements on the grounds that "they are necessary to assure that Title X grantees apply federal funds only to federally authorized purposes and that grantees avoid creating the appearance that the Government is supporting abortion-related activities." Id. at 188, 111 S.Ct. at 1769.

Ultimately, the Rust Court rejected the unconstitutional condition claim since:

> By requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has . . . not denied it the right to engage in abortion-related activities. Congress has merely refused to fund such activities out of the public fisc, and the [agency] has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program.

Id. at 198, 111 S.Ct. at 1774.

The LASH I court therefore framed the issue as follows: "The more difficult question (and the more contested between

the parties) consists of what side of the continuum this case falls with regard to Rust." LASH I, 961 F.Supp. at 1415. Ultimately, the LASH I court determined that the LSC regulations were less flexible and more burdensome than the Rust regulations, concluding that "the LSC regulations fall on the unconstitutional side of Rust," and accordingly found that the plaintiffs were likely to prevail on the merits. Id. at 1416.

Of particular importance to the LASH I court was the combination of the expansion of the restrictions with the LSC's long-standing interrelated organizations policy. The court noted that in light of the expansiveness of the factors used to determine whether a recipient "controls" an organization, which made likely a finding of control between a recipient and any other organization in a relationship with the recipient, "the LSC regulations cannot be said to be more liberal than those in Rust." Id. In other words, "the Rust regulations appear far more expansive in allowing an organization to pursue" its involvement in prohibited activities through other organizations. Id. In its probability of success on the merits inquiry, therefore, the LASH I court concluded that the LSC regulations were most analogous to those in League of Women Voters, the only case in the unconstitutional conditions doctrine trilogy that held that adequate alternative channels were not available for the expression of First Amendment rights. Id.

C. The Interim Regulations Promulgated Subsequent to LASH I

On January 27, 1997, little more than two weeks prior to the LASH I decision, plaintiffs in this Court filed their

amended complaint, attacking the same set of restrictions at issue in LASH I. In the aftermath of the LASH I court's holding that the challenged regulations fell on the unconstitutional side of Rust, on March 14, 1997 the LSC promulgated new, interim regulations which were "intended to address constitutional challenges raised by the previous rule." 62 Fed.Reg. 12,101 (1997) ("interim regulations"). Although issued after plaintiffs' amended complaint, the interim regulations were in place at the time of the preliminary injunction Hearing.[13] Counsel for defendant-intervenor United States conceded at the Hearing that passage of the interim regulations was an attempt to cure the constitutional deficiencies found by the LASH I court, Tr.[14] at 63, and that the Court should focus its attention on the constitutionality of the new regulations. Tr. at 4 ("the playing field really has narrowed . . . what we're really debating about are whether or not the program integrity requirements and the new regulations are constitutional in light of Rust"); see also 62 Fed.Reg. 12,101, 12,101 ("limited adjustments" are

---

13. At the Hearing, counsel for plaintiffs argued that the LASH I court's analytical framework and legal conclusions were correct, with the exception of the court's holdings that three of the restrictions did not implicate plaintiffs' constitutional rights. Thus, a holding by this Court at that posture of the litigation that the interim regulations were constitutionally impermissible would have required the Court to examine those three disputed provisions. On the other hand, a determination that the regulations were sufficient to protect plaintiffs' constitutional rights would render academic the issue of which of the Act's restrictions implicated the constitution in the first instance.

14. "Tr." refers to the transcript of the preliminary injunction Hearing.

intended to "respond to the constitutional concerns addressed by the [LASH I] Court"). Plaintiffs' counsel also conceded at the Hearing that the battle ground had really shifted to the new regulations. Tr. at 36-37 ("I don't believe it's impossible to develop a set of regulations that would permit the Government to advance the only interest that it has here.").

The interim regulations made two critical changes to the regulations in existence at the time LASH I was decided. First, the transfer of funds provision was revised so that transfer by a recipient of non-LSC funds would not be burdened by the statutory prohibitions. 45 C.F.R. § 1610.7. However, the LSC added a new section entitled "Program integrity of recipient." 45 C.F.R. § 1610.8. As conceded by counsel for LSC and counsel for the United States at the Hearing, the program integrity requirements were carefully patterned after those approved in Rust. See Tr. at 51 ("These are exactly the same kinds of regulations from Rust . . . . In fact, the language of them is exactly the same.") (statement by counsel for LSC); Tr. at 63 ("The folks at LSC sat down and they promulgated regulations. They asked themselves how to do it, and what they did is they looked at what the Supreme Court said in Rust and they did their level best to copy from Rust.") (statement by counsel for United States).

Program integrity requirements regulate the ability of recipients to maintain a relationship with organizations, often referred to as "affiliates," that do not receive any LSC funds and engage in activities prohibited by the Act. Unlike organizations "controlled" by recipients, which are deemed to be LSC actors, affiliates can maintain a relationship with a recipient yet engage in prohibited activities. As in Rust,

the use of affiliates under the interim regulations was intended to strike a balance between providing an outlet to engage in advocacy prohibited by the Act and maintaining the integrity of the Act by ensuring that no LSC funds would be used to subsidize prohibited activities in violation of congressional intent. The program integrity requirements section of the interim regulations reads, in pertinent part:

> [The Act's restrictions will not be applied to an affiliate if it] is physically and financially separate from the organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. In order to be physically and financially separate, the recipient and the [affiliate] must have an objective integrity and independence from one another. Factors considered to determine whether such objective integrity and independence exist shall include, but are not limited to:
>
> (i) The existence of separate personnel;
>
> (ii) The existence of separate accounting and timekeeping records;
>
> (iii) The existence of separate facilities; and
>
> (iv) The extent to which signs and other forms of identification which distinguish the recipient from the [affiliate] are present.

45 C.F.R. § 1610.8(b)(3).

Appendix B

Although based on the Rust program integrity requirements, the interim regulations did not exactly mirror those requirements. Several differences between them are noteworthy because they formed the basis of plaintiffs' position at the time of the Hearing that the program integrity requirements were unconstitutional in part because they were more restrictive than the Rust program integrity regulations.

First, in addition to the program integrity requirements, a separate section in the interim regulations perpetuated the LSC's former "interrelated organizations" policy. The regulation provided in that regard:

> If a recipient controls, is controlled by or is subject to common control with another organization, the two organizations are interrelated organizations and the restrictions in this part will be applied to both organizations, unless the association between the two organizations meets the standards of program integrity in paragraph (b) of this section.

45 C.F.R. § 1610.8(a). This provision formally replaced the LSC's prior "interrelated organizations" regulation. 62 Fed.Reg. 12,101, 12,101 (1997). Under this new provision, therefore, an organization could be "controlled" by a recipient yet engage in prohibited activities so long as the program integrity requirements were satisfied. Despite this exception, no provision regarding control appeared in Rust's program integrity requirements, and plaintiffs argued that this provision contributed to the regulation's constitutional infirmity. See Plaintiffs' Reply Memorandum at 8-9.

The second difference between the interim and Rust program integrity requirements concerns one of the four factors used in the program integrity analysis — namely, the separateness of the recipient's and affiliate's facilities. In Rust, the regulation stated that the "degree of separation" of facilities would be considered, whereas the interim regulation required the "existence" of separate facilities. Plaintiffs argued that "[t]his difference appears to be more than semantics," id. at 10, and that "[u]nlike the [Rust regulation], which measured the degree of separation, the LSC rule focuses on the existence of separate facilities." Id.

Third, the Rust program integrity requirements stated that the determination of whether a recipient and affiliate were sufficiently separate would be based on all "facts and circumstances," whereas the interim regulations made no such statement, which arguably implied that in order to show objective integrity, a recipient would have to satisfy each and every program integrity factor. Plaintiffs emphasized that unlike the Rust program integrity requirements, which "made it clear that [each of the four considerations] was only one factor in the assessment of program integrity," the interim regulations appeared to establish a "per se test." Id. Based on all these differences between the interim regulations and the Rust program integrity requirements, plaintiffs concluded that the LSC restrictions on the use of affiliates "go[ ] far beyond the simple segregation requirements of Rust." Id. at 12.

The Court asked plaintiffs' counsel at the Hearing whether it might be provident to withhold judgment until the final regulations were promulgated, commenting:

> [T]hese are interim regulations. Is there not some wisdom in allowing some period of time to let the dust settle until we get final regulations? They may come in a different form two months from now or three months from now. You may have to come back to this or another court to deal with a whole different spate of regulations.

Tr. at 8. The colloquy continued as follows:

> [PLAINTIFFS]: If there's any change, we'll let you know immediately, but I should say, I don't anticipate that there will be a significant change. We think that these are the regulations that we're going to be operating on into the foreseeable future.
>
> THE COURT: You know, there were a spate of new regulations after Judge Kay [in LASH I] spoke. Maybe after we have this argument today, there will be more regulations.

Tr. at 10. At the conclusion of the Hearing, the Court, noting the responsiveness of the rulemaking process to the LASH litigation, commented:

> Maybe as a result of this opportunity for all of us to discuss these issues, there can be some further way in which these matters can be addressed, or there will be an ongoing dialogue between people of good will and good spirit in our great profession. If [this Hearing] has possibly

> facilitated that possibility, I feel that's also a purpose to be served from my end of the spectrum
> . . . .

Tr. at 68.

D. The Final Program Integrity Requirements

On May 21, 1997, the LSC replaced the interim regulations with what it termed the "Final rule," which made revisions to the interim rule "[b]ased on [comments received by the LSC] and its own internal research and review." 62 Fed.Reg. 27,695, 27,695 (May 21, 1997) ("final regulations"). The Court therefore will treat plaintiffs' motion as directed at the final regulations rather than the regulations analyzed in LASH I or the interim regulations issued shortly after LASH I and in effect at the time of the Hearing. In particular, the Court focuses on the revised program integrity requirements, which plaintiffs contend are still overly restrictive in a manner which renders them facially unconstitutional.

The program integrity section of the final regulations provides as follows:

> (a) A recipient must have objective integrity and independence from any organization that engages in restricted activities. A recipient will be found to have objective integrity and independence from such an organization if:

Appendix B

(1) The other organization is a legally separate entity ["separate entity requirement"];

(2) The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities ["no subsidy requirement"]; and

(3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include but will not be limited to:

(i) The existence of separate personnel;

(ii) The existence of separate accounting and timekeeping records;

(iii) The degree of separation from facilities in which

> restricted activities occur, and the extent of such restricted activities; and
>
> (iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present [collectively the "separation factors"].

45 C.F.R. § 1610.8(a). Significantly, subsection (b) of § 1610.8 provides that recipients must certify to the LSC their compliance with the program integrity requirements.

The revised program integrity section eliminates virtually every difference between the interim regulations and the Rust regulations in respect to program integrity requirements. First, the final requirements deleted the provision regarding control of an affiliate by a recipient. The LSC removed the provision because "the [LSC] determined that if a program is found to be in compliance with the [remainder of the] program integrity test, there would be a sufficiently separate identity and operational independence from the recipient." 62 Fed.Reg. 27695, 27697.

The final regulations made two further changes intended to bring the program integrity requirements exactly in line with Rust. First, the separate facilities factor was changed from "the existence of separate facilities" to "the degree of separation from facilities in which restricted activities occur."

And second, the LSC added language to emphasize that there is no per se rule in respect to the factors relevant to the program integrity determination. In fact, the new language is even less restrictive than the Rust regulation since it states that "[t]he presence or absence of any one or more factors will not be determinative."

The Court notes that, despite the similarity between the program integrity requirements in Rust and the LSC's final regulations, the Rust regulations placed further restrictions on federally-funded family planning projects which have no counterpart in the LSC regulations. First, the Rust regulations limited the content of a doctor's advice to the project's client; specifically, Title X doctors were forbidden from advising women regarding abortion. Rust, 500 U.S. at 179, 111 S.Ct. at 1764 (citing 42 C.F.R. § 59.8(a)(1) (1989)). Second, doctors were absolutely prohibited from referring clients to a project which performed abortions, which included any affiliate of the project. Id. at 179-80, 111 S.Ct. at 1764-65 (citing 42 C.F.R. § 59.8(a)(2)). And third, doctors were banned from even explaining to the patient that the content of the advice given was being curtailed by an administrative rule. Id. at 180, 111 S.Ct. at 1765 (citing 42 C.F.R. § 59.8(b)(5)).

Notably, although the LSC chose to incorporate the program integrity requirements from Rust into the final regulations, it did not carry over from Rust any specific restrictions on: (1) counseling the client; (2) referring the client to another group, such as the recipient's affiliate; and (3) explaining to the client that it cannot perform the prohibited activity because it is barred by LSC regulation.

Appendix B

Since the Act itself does not state whether the prohibited activities, most of which are actions taken outside of the recipient's office, are intended to encompass legal advice, referral to affiliates, and explanation about the Act, the Court interprets the LSC's decision not to carry over these additional restrictions from the Rust regulations as an implicit approval of these three activities. Counsel for the LSC recognized this interpretation as the LSC's position in a letter to the Court:

> [In contrast to Rust], the statutory restrictions at issue here (as implemented by LSC's regulations) do not prevent LSC-subsidized lawyers from fully advising their clients of their legal rights and practical options; indeed, the restrictions do not inhibit lawyers' speech to their clients at all. For example, an LSC lawyer is free to advise potential clients that their case is best suited for class action treatment, or that they may have a claim that a welfare law is unconstitutional. The lawyer is also permitted to advise potential clients that while the LSC-funded entity cannot take the case, the lawyer knows of other attorneys who can. Therefore, unlike the women in Rust, who received "skewed" information, the clients of LSC-subsidized lawyers receive complete information.

Letter to the Court from Alan Levine, dated March 31, 1997 at 2.

Appendix B

III. LASH II

Following the issuance of the final program integrity requirements, the LSC moved for summary judgment in the Hawaii court, contending that the final revisions made by the LSC brought the regulations into complete conformity with the Rust program integrity requirements, thereby compelling a determination that the final program integrity requirements were no more burdensome on plaintiffs' constitutional rights than those at issue in Rust. The Hawaii court agreed. In an Order dated August 1, 1997, the court dissolved the previously entered preliminary injunction as moot, and granted LSC's motion. Legal Aid Society of Hawaii, et al. v. Legal Servs. Corp., 981 F.Supp. 1288 (D.Haw.1997) ("LASH II").

The LASH II court began its analysis by noting that the LSC regulations on interrelated organizations had been substantially modified by the interim and final regulations, and that the issue in the case had therefore been reduced to the following:

> [D]oes a legal aid organization's ability to control a separate legal organization with separate personnel and facilities provide an alternative channel for the exercise of the first legal aid organization's constitutional rights as required by the unconstitutional conditions doctrine.

Id. at 1292. The LASH II court summarized its First Amendment holding by emphasizing that the ability of recipients to exercise control over affiliates constituted an

adequate alternative channel for exercising their First Amendment rights:

> The Court reads the new regulations as allowing a LSC funded organization to control another organization that engages in restricted activities so long as all the insularity and separate incorporation requirements of the regulations are satisfied. With this ability to control the separately incorporated and insular second organization, the Court finds that alternative channels exist for LSC-funded organizations to exercise their constitutionally protected rights such as lobbying the legislature. Thus, the LSC-funded legal aid societies will be able to control affiliates who care for the needs of the poor in areas from which the regulations restrict the societies.

LASH II at 1289.

In reaching this conclusion, the court rejected a number of arguments advanced by the plaintiffs in their effort to distinguish Rust. First, in respect to the insularity requirements, the court rejected plaintiffs' contention that Rust only upheld requirements beyond mere bookkeeping separation because it is more difficult for doctors than lawyers to account for their time. The court held that "[i]t is no more difficult for a doctor to categorize his conversation with a patient than it is for a lawyer to do so with his client." Id. at 1292.

The court then summarily rejected the argument that Rust was distinguishable because the Act was not intended to

convey a Government message, stating that "Congress does not control the analysis and advice of either a Title X doctor or a LSC lawyer except for prohibiting advice in certain areas such as abortion." Id. at 1292. The court then considered the claim that since litigation, unlike communication in a doctor's office, is a traditional sphere of expression, Rust cannot control. The court noted that, even assuming litigation was a traditional sphere of expression, restrictions on those forms of expression are not per se unconstitutional; rather, such expression is subject to First Amendment vagueness and overbreadth doctrines. The court did not address the issues of overbreadth or vagueness since it determined that plaintiffs "have not alleged that the restrictions are vague or overbroad." Id.

The LASH II court then noted that the final program integrity requirements were more restrictive than the Rust regulations insofar as the affiliate of LSC recipients had to be separately incorporated. This difference, the court determined, was insubstantial in light of the approbation given to such a requirement by the Supreme Court in Regan v. Taxation with Representation, 461 U.S. 540, 544 n. 6, 103 S.Ct. 1997, 2000 n. 6, 76 L.Ed.2d 129 (1983) (noting that such a requirement is not "unduly burdensome"). The court thus concluded that "[t]he requirement of separate incorporation does not in any significant way add to Plaintiffs' burdens." 981 F.Supp. at 1296.

Finally, the LASH II court dismissed plaintiffs' due process and equal protection arguments. The due process claims were rejected primarily on the ground that, as dictated by Rust, "Congress' refusal to fund the restricted activities

here leaves the indigent clients with the same choices they would have had absent the creation of the LSC." Id. at 1298. The court therefore concluded that "the regulations cannot be deemed to 'impermissibly burden' whatever Due Process rights the client may have." Id. The court also emphasized that the "ample alternative channels" provided by the regulations significantly diminished the impact of the restrictions on indigent clients. Id. at 1300. Turning to the equal protection claims, the LASH II court rejected these contentions for two reasons. First, since poverty is not a suspect classification, any discrimination against the poor need only have a rational basis to survive an equal protection challenge. The court had no trouble finding that the regulations passed the rational basis level of scrutiny. Id. And second, the court dispelled the notion that the equal protection clause was violated because of "discriminatory distribution of fundamental rights," noting the "long line of cases holding that the government need not fund the exercise of a fundamental right." Id. (citing Harris v. McRae, 448 U.S. 297, 315, 100 S.Ct. 2671, 2687, 65 L.Ed.2d 784 (1980)).

ISSUES CURRENTLY BEFORE THE COURT

Although there have been no submissions by the parties addressing LASH II, based upon prior submissions to the Court plaintiffs presumably would not concur in LASH II's approbation of the final regulations, except in respect to the separate incorporation requirement, which they do not contest. Plaintiffs' contentions embrace the arguments made by the plaintiffs in LASH II, but are in a number of respects more expansive. As best the Court can glean from the memoranda of law, oral argument, and a number of post-

Appendix B

Hearing letters submitted both before and after the adoption of the final regulations, the following issues are fairly presented to the Court in the context of plaintiffs' preliminary injunction application: (1) can the LSC lawfully adopt regulations to guard against the appearance that the Government endorses the prohibited activities; (2) if so, are the regulations enacted by the LSC, specifically the "separate personnel" and "degree of separate facilities" program integrity requirements, properly drawn to address that interest considering the differences, such as they are, between the Title X proscriptions in Rust and the impact in this case on the legal profession and the attorney-client relationship; and (3) do any of the restrictions or regulations violate the Due Process or Equal Protection clause of the Fifth Amendment?

DISCUSSION

I. Preliminary Injunction Standard

Generally, in order to obtain preliminary injunctive relief, a plaintiff must show "a threat of irreparable injury and either (1) a probability of success on the merits or (2) sufficiently serious questions going to the merits of the claims to make them a fair ground of litigation, and a balance of hardships tipping decidedly in favor of the moving party." Time Warner Cable v. Bloomberg L.P., 118 F.3d 917, 923 (2d Cir.1997). However, when a plaintiff seeks to enjoin " 'governmental action taken in the public interest pursuant to a statutory or regulatory scheme,' " plaintiffs must meet the stricter "probability of success" standard. Id. (quoting Plaza Health Lab., Inc. v. Perales, 878 F.2d 577, 580 (2d Cir.1989)); see also Jolly v. Coughlin, 76 F.3d 468, 473 (2d

Cir.1996) (When seeking to enjoin such governmental action, plaintiffs "cannot resort to the 'fair ground for litigation' standard."). Plaintiffs recognize that, since they seek to enjoin the LSC's enforcement of regulations issued pursuant to a statutory scheme, they must demonstrate a probability of success on the merits. Memorandum of Law in Support of Motion For Preliminary Injunction at 6.

Since the parties all appropriately agree that the final regulations implicate plaintiffs' First Amendment rights, the key inquiry is whether they go so far as to actually violate those rights. The Court recognizes that, if plaintiffs' First Amendment rights are violated, then they almost certainly have established irreparable harm. See Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitute irreparable injury.").

II. Permissibility of the Final Regulations

All parties agree that as a consequence of enactment of the subject regulations after the commencement of plaintiffs' lawsuit challenging the constitutionality of the Act, the focus of this litigation has essentially shifted. Indeed, plaintiffs acknowledge that the Court's principal inquiry is to now determine whether the regulations constitutionally "provide a meaningful opportunity for LSC recipients to engage in restricted activities using non-LSC funds." Plaintiffs' Reply Memorandum at 2. However, before turning to the constitutionality of the Act as implemented by the final regulations, the Court must determine the threshold issue of

whether those regulations constitute a permissible construction of the Act by the LSC. See Rust, 500 U.S. at 183-87, 111 S.Ct. at 1766-68. This requires an analysis of whether the final regulations are consistent with the Act's language and congressional intent. Id.

Plaintiffs contend that the program integrity requirements are not a permissible construction of the Act because they require more than "maintain [ing] accurate time and expense records distinguishing restricted from unrestricted activities . . . so that LSC could verify that federal funds were not spent on restricted activities." Plaintiffs' Supplemental Memorandum of Law at 6. From the plaintiffs' perspective, the only permissible regulation the LSC can implement to ensure separation between the recipient and affiliate is the imposition of such "bookkeeping" requirements.

The Court's permissibility analysis is guided by the broad-based principle of administrative law that when reviewing an agency's construction of a statute which does not "directly [speak] to the precise question at issue," the court must bear in mind that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-44, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694 (1984). Moreover, "[i]n determining whether a construction is permissible, '[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.' "

Rust, 500 U.S. at 184, 111 S.Ct. at 1767 (quoting Chevron, 467 U.S. at 843 n. 11, 104 S.Ct. at 2781 n. 11). Furthermore, the Court notes that the United States Court of Appeals for the District of Columbia Circuit has held that LSC regulations are entitled to full Chevron deference. See Texas Rural Legal Aid, Inc. v. Legal Servs. Corp., 940 F.2d 685, 689-90 (D.C.Cir.1991) ("We conclude that the basic principles of Chevron apply to the statutory scheme created by the Act and the role contemplated for LSC under it.").

Chevron's canon of deference to agency interpretations is applicable to this case because nothing in the Act speaks to the precise question of how, or even whether, program integrity requirements can be maintained. See Rust, 500 U.S. at 184, 111 S.Ct. at 1767 (the statute "does not speak directly to the issue[ ] of . . . program integrity"). The Act gives no indication as to the steps a recipient must take to separate its LSC-authorized activity from its engagement in prohibited activity funded by non-LSC sources. The Court therefore turns to the question of whether the LSC's interpretation of the Act is consistent with the Act's language and underlying intent.

The Court rejects plaintiffs' proposed construction of the Act because it would undermine the Act's attempt to achieve a significant measure of separation between recipients and the prohibited activities. The Government interest underlying the Act is broader than just preventing the subsidization of prohibited activities with federal funds — indeed, if that were the case, there would be no need to restrict the use of non-LSC funds at all. Rather, the Act reveals an additional interest — preventing the appearance of Government endorsement of the prohibited activities.

Appendix B

Congress' intent to prevent the appearance of endorsement through passage of the Act is supported by two facts. First, the difference between the wording of the Act and its predecessors reflects Congress' intent to move beyond recipients' prior practice of using nothing more than accounting procedures to document compliance with the statutory proscriptions on using federal funds for prohibited activities. Specifically, the pre-Act statutory language focused on the subsidization interest by providing that "[n]o funds made available by [LSC] may be used" for any of the prohibited activities, 42 U.S.C. § 2996f(b), whereas the Act states that "[n]one of the funds appropriated [by the LSC] may be used to provide financial assistance to any [recipient]" that engages in any of the prohibited activities. Act § 504(a). This broader language evinces an intent to distance recipients of any LSC funds from all of the prohibited activities rather than merely tracing the path of federal funds.

The second indication of this intent is contained in the Senate Report which accompanied the Act when it was reported out of the Committee on Labor and Human Resources:

> [The Act] also bans LSC attorneys from using nonfederal funds for any purpose prohibited by the LSC Act, as amended. There are two important justifications for this restriction. First, many legal services grantees currently receive funds from both public and private sources. Since the money is basically fungible, it would be difficult if not impossible to place restrictions only on the

> Federal funds. Second, the public cannot differentiate between LSC advocacy subsidized with public versus private funds. As a result, the public grows weary of watching LSC attorneys lobby legislators — even if that dismay might sometimes be misplaced.

S.Rep. No. 104-392, at 6 (1996). That the LSC shares this view of the Government interests at stake is confirmed by the preamble to the interim regulations:

> [The program integrity requirements] are necessary to ensure that there is no identification of the recipient with restricted activities and that the [affiliate] is not a sham or paper organization and is not so closely identified with the recipient that there might be confusion or misunderstanding about the recipient's involvement with or endorsement of prohibited activities.

62 Fed.Reg. 12101, 12102. Under the plaintiffs' interpretation, the Act would have no practical impact on the day-to-day operations of recipient organizations. Recipient organizations could simply continue to use non-LSC funds for prohibited activities, label such as the actions of their "affiliate," and keep accounting records to document this nominal separation. Surely Congress did not intend such a meaningless change in the law.

Applying Chevron deference to the LSC's interpretation of the Act, the Court concludes that the final regulations are consistent with the Act's language and intent, and therefore

constitute a permissible construction of the Act. The Court rejects plaintiffs' counter-interpretation as contrary to congressional intent to achieve both a monetary and clearly identifiable separation between recipients and affiliates.

It is also apparent that Congress may always lawfully decide to disassociate itself from the appearance of endorsement of activities it chooses not to subsidize. Thus, in League of Women Voters, the Supreme Court noted that "the Government certainly has a substantial interest in ensuring that the audiences of noncommercial stations will not be led to think that the broadcaster's editorials reflect the official view of the government." 468 U.S. at 395, 104 S.Ct. at 3125. Similarly, the Court in Rust implicitly gave its approbation to the Government's contention that program integrity requirements "are necessary to assure that Title X grantees . . . avoid creating the appearance that the Government is supporting abortion-related activities." 500 U.S. at 188, 111 S.Ct. at 1769.

III. Constitutionality of the Act as Implemented by the Final Regulations

Plaintiffs contend that the program integrity requirements are not appropriately tailored to the Government's interest in avoiding the appearance of endorsement. They argue, specifically, that the insularity requirements — separate personnel and degree of separate facilities — while embraced by the Court in Rust, have no warrant in the context of the lawyer-client relationships and the nature of the prohibited activities in this case. They distinguish Rust as follows:

Appendix B

> The Title X regulations applied to a doctor counseling a patient alone in the doctor's office and the prohibition to be effectuated by those regulations was preventing the doctor from counseling abortion, when funded by the Government. In that context, considerations of separate personnel and separation of facilities, and signs and other forms of identification were relevant to making sure that the patient understood that when she was receiving abortion counseling at the same family planning clinic, it was not supported by federal funds.

Letter to the Court from Peter M. Fishbein, dated June 5, 1997.

By contrast, plaintiffs contend that the restricted activities here at issue "are actions to be taken outside the office," namely "in courts, administrative agencies or legislative bodies," and that the appearance that these activities are being carried out with LSC funds can be obviated "simply by requiring that the papers filed or the advocate making the presentation clearly identify that the activity is being carried out by the entity that is not funded by LSC." Id.

In addition, plaintiffs attack the final regulations as "vague and unworkable" because "arrangements will be assessed 'on a case-by-case basis' and determinations 'will be based on the totality of the facts.' " Letter to the Court from E. Joshua Rosenkranz, dated May 27, 1997. Accordingly, plaintiffs conclude that the "LSC has created

a standardless world in which the only rational judgment a Legal Services program could possibly make is not to enter into an affiliate relationship or, once it did, not tinker with it." They contend that the "LSC can easily draft regulations that provide more guidance to recipients of LSC funds." Id.

Plaintiffs' arguments cannot carry the day for a number of reasons. Initially, when dealing with an interest that is viewpoint neutral and not aimed at suppressing vital, fundamental constitutional rights, the Government need only show "a 'fit' between the legislature's ends and the means chosen to accomplish these ends . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective." Florida Bar v. Went For It, Inc., 515 U.S. 618, 632, 115 S.Ct. 2371, 2379, 132 L.Ed.2d 541 (1995) (quoting Board of Trustees v. Fox, 492 U.S. 469, 480, 109 S.Ct. 3028, 3034, 106 L.Ed.2d 388 (1989)); see also Rust, 500 U.S. at 195 n. 4, 111 S.Ct. at 1773 n. 4; City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804-05, 104 S.Ct. 2118, 2128-29, 80 L.Ed.2d 772 (1984); United States v. O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672 (1968). This would appear to be the proper standard to apply when evaluating whether regulations are properly drawn to protect the Government's interest in avoiding the perception of endorsement of programs which it does not subsidize.

Moreover, in order to sustain their facial challenge to the final regulations' program integrity requirements, plaintiffs "must demonstrate that the challenged law either 'could never be applied in a valid manner' or that even though it may be validly applied to the plaintiff and others, it

nevertheless is so broad that it 'may inhibit the constitutionally protected speech of third parties.' " New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 11, 108 S.Ct. 2225, 2232, 101 L.Ed.2d 1 (1988) (quoting Taxpayers for Vincent, 466 U.S. at 798, 104 S.Ct. at 2124); see also Sanitation and Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 992 (2d Cir.1997); Rust, 500 U.S. at 183, 111 S.Ct. at 1766 ("A facial challenge . . . is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that [the regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render [them] wholly invalid.") (quoting United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987)).

The Court does not find persuasive plaintiffs' contention that the "separate personnel" and "degree of separate facilities" requirements, each of which are limited to the office environment, are irrelevant to the Government's asserted interest in preventing the appearance of endorsement because the prohibited activities all take place in a courtroom or other forum outside of recipients' offices and that, in any event, a mere disclaimer would be sufficient. Contrary to plaintiffs' assertion, many integral aspects of engaging in prohibited activities take place in the recipients' office, such as: taking depositions, drafting pleadings, and preparing witnesses for trial. It simply cannot be said that potential clients, opposing attorneys, and other visitors to the recipient's office would not be exposed and vulnerable to the perception, absent separate personnel and facilities, that

the Government supports the prohibited activities. Furthermore, the suggestion by plaintiffs that a mere disclaimer on documents submitted to courts and legislatures is sufficient to prevent the appearance of endorsement does not square with reality. Although judges and law clerks, as well as legislators and their aides, might notice the disclaimer, it is unlikely that the media would report the disclaimer to the public. Moreover, even if the disclaimer was announced at the commencement of or intermittently during a judicial or legislative proceeding, there is simply no reasonable assurance that members of the public attending various stages of the proceeding would be privy to the announcement.

Plaintiffs' contention that the regulations which direct the LSC to make determinations of program integrity on a case-by-case basis and not to place determinative weight on any one factor render them "vague and unworkable" fails as well, especially in light of Rust. Indeed, this contention runs directly contrary to the argument plaintiffs made in their reply memorandum, which criticized the interim regulations for imposing a rigid "per se test" rather than adopting from Rust a flexible test where no one factor would be determinative. Plaintiffs' Reply Memorandum at 10. Now that the LSC has revised its regulations to incorporate the same degree of flexibility as the Rust regulations, plaintiffs protest that the regulations are unworkable. Plaintiffs' abrupt about-face undermines the integrity of their reconstituted position. In any event, the Rust Court specifically noted, and gave its implicit approval to, the fact that the program integrity factors were "nonexclusive" and were to be applied through "case-by-case" determinations. 500 U.S. at 181, 111 S.Ct. at 1766. Nor are the program integrity requirements "void for

vagueness." The separation factors give fair warning to recipients of the standards by which their program integrity compliance certifications will be evaluated. See Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972); cf. Finley v. National Endowment for the Arts, 100 F.3d 671, 681 (9th Cir.1996) (striking down as unconstitutionally vague funding criteria requiring that art works show "decency and respect for the diverse beliefs and values of the American public"), cert. granted, __ U.S. __, 118 S.Ct. 554, 139 L.Ed.2d 396 (1997). They are "sufficiently clear that the speculative danger of arbitrary enforcement does not render [them] void for vagueness." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 503, 102 S.Ct. 1186, 1195, 71 L.Ed.2d 362 (1982).

In respect to the recipients' program integrity compliance certifications, 45 C.F.R. § 1610.8(b), the LSC presumably will attach significant credence and presumptive validity to such certifications by recipient organizations, which are in the main staffed and/or supervised by members of the bar. This will undoubtedly minimize the prospects of "as applied" litigation challenges. The Court therefore determines that the "case-by-case basis" and "no one factor is determinative" language, in conjunction with the separation factors, are appropriately tailored to advance the Government's interest in preventing the appearance of endorsement, and accordingly do not render the regulations facially invalid.

Nor, in a similar vein, can the regulations be considered unconstitutionally overbroad. The Second Circuit has recently emphasized that overbreadth challenges are to be accepted "sparingly and only as a last resort," Sanitation and

Recycling Indus., Inc., 107 F.3d at 997 (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973)), and that such a challenge "may prevail only if plaintiffs can show that an impermissible risk is created that ideas may be chilled whenever" the law is applied. 107 F.3d at 997. Further, "invalidation of a statute on its face is permitted 'only if the overbreadth is substantial.' " Lebron v. National R.R. Passenger Corp., 69 F.3d 650, 660 (2d Cir.1995) (quoting Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 574, 107 S.Ct. 2568, 2571, 96 L.Ed.2d 500 (1987)); see also Dorman v. Satti, 862 F.2d 432, 436 (2d Cir.1988) ("An act's overbreadth 'must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' ") (quoting Broadrick, 413 U.S. at 615, 93 S.Ct. at 2917). This Court has not hesitated to invoke the overbreadth doctrine in the face of a facial constitutional challenge whenever a challenged regulation "does not aim specifically at evils within the allowable area of [government] control, but . . . sweeps within its ambit other activities that constitute an exercise" of protected constitutional rights. See Scott v. Goodman, 961 F.Supp. 424, 427 (E.D.N.Y.1997) (quoting Thornhill v. Alabama, 310 U.S. 88, 97, 60 S.Ct. 736, 741, 84 L.Ed. 1093 (1940)). Such, however, is plainly not the present case since neither the Act nor the regulations can plausibly be perceived as having such a preclusive effect upon the exercise of the plaintiffs' or third parties' First Amendment rights.

Having determined that the program integrity requirements are appropriately tailored to advance the Government's legitimate interest in preventing the appearance of endorsement and that they are not overbroad,

the Court now turns its attention to plaintiffs' overarching argument that "the affiliate rules in Rust do not provide the benchmark where, as here, the restrictions strike at the heart of activities that are laden with First Amendment value." Letter to the Court from E. Joshua Rosenkranz, dated May 27, 1997 (quoting Plaintiffs' Reply Memorandum at 2).

There is no quarrel amongst the parties, nor could there be, that when the Government imposes upon the time-honored functions of the lawyer and, in particular, the lawyer-client relationship, it treads deeply in waters bound up in First Amendment sensibilities. As the Court in LASH I correctly assessed, the restrictions embodied by the Act impact, under the umbrella of the First Amendment, a broad range of rights affecting the pursuit and vindication of legal interests, including the right to lobby legislators and administrators, access to the courts, and even the confidential nature of the relationship between lawyers and prospective clients. LASH I, 961 F.Supp. at 1408-09. Because of the spate of new restrictions which Congress has now added to its prior restrictions upon LSC recipients, and the broad range of First Amendment rights arguably impacted by these restrictions, plaintiffs contend that Rust is not an appropriate analogue since the limited and narrowly drawn abortion counseling constraints did not significantly, if at all, impinge on the doctor-patient relationship. By contrast, plaintiffs assert that the profundity of the lawyering restrictions here at issue do indeed affect the fundamental nature of lawyering and the attorney-client relationship.

The Court in Rust recognized that there are certain traditional spheres of free expression "so fundamental to the functioning of our society" that the Government's ability to

restrict basic First Amendment rights within that sphere by attaching conditions to the expenditure of Government funds "is restricted by the vagueness and overbreadth doctrines of the First Amendment," meaning in that context that the restriction, if justified at all, must be especially precise. Rust, 500 U.S. at 200, 111 S.Ct. at 1776 (citing Keyishian v. Board of Regents, State Univ. of N.Y., 385 U.S. 589, 603, 605-06, 87 S.Ct. 675, 683, 684-85, 17 L.Ed.2d 629 (1967)) ("We emphasize once again that '(p)recision of regulation must be the touchstone in an area so closely touching our most precious freedoms,' " 385 U.S. at 603, 87 S.Ct. at 683, quoting N.A.A.C.P. v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405 (1963)). The Rust Court surmised by analogy that it could be argued "that traditional relationships such as that between doctor and patient should enjoy [special] protection under the First Amendment from Government regulation, even when subsidized by the Government." Id. The lawyer-client relationship obviously is at least on equal First Amendment footing with the doctor-patient relationship, and given the panoply of the constitutional rights of association and speech adhering to the attorney-client relationship, one could conceivably argue that the First Amendment is even more caught up in the lawyer-client relationship than the doctor-patient relationship.

The Court in Rust, however, did not deem it necessary to explore the nature of the doctor-patient relationship since it was of the opinion that the Title X program regulations did not "significantly impinge" upon that relationship because "[n]othing in them requires a doctor to represent as his own any opinion that he does not in fact hold." Id. In that respect, the Court attached significance to the fact that

the regulations did not preclude the doctor from advising the patient that "advice regarding abortion is simply beyond the scope of the program." It concluded, therefore, that "[i]n these circumstances, the general rule that the Government may choose not to subsidize speech applies with full force." Id.

While the Court obviously has reverence for the majesty of the law, the restrictions pertaining to LSC recipients do not significantly impinge on the lawyer-client relationship, especially when contrasted with Title X's proactive aspects. Indeed, they simply proscribe the activities in which LSC recipients may engage.[15] Moreover, the extent of the activities which LSC recipients are prohibited from engaging in cannot enter into the constitutional mix since it is bedrock law that Congress need not fund the exercise of constitutional rights, regardless of their magnitude. See Lyng v. International Union, United Auto., Aerospace and Agric. Implement Workers, 485 U.S. 360, 368, 108 S.Ct. 1184, 1190, 99 L.Ed.2d 380 (1988) ("We have held in several contexts

---

15. For this reason, the Court also rejects plaintiffs' contention that Rust is distinguishable because here recipients are not acting as Government "mouthpieces." Tr. at 46-47. As the Supreme Court recently clarified in Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 829-30, 115 S.Ct. 2510, 2516-17, 132 L.Ed.2d 700 (1995), the "government as speaker" analysis is only implicated when the Government engages in viewpoint, rather than content, discrimination. Congress can constitutionally define the scope of its funding programs by excluding subject matter regardless of whether it is attempting to convey a particular message. Cf. Rosenberger, 515 U.S. at 831, 115 S.Ct. at 2517 ("By the very terms of the [regulation], the [government] does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.").

[including the First Amendment] that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.") (quoting Regan v. Taxation with Representation, 461 U.S. 540, 549, 103 S.Ct. 1997, 2002, 76 L.Ed.2d 129 (1983)). It matters not, therefore, whether one or more activities are proscribed since the numerosity of prohibited activities is not correlated to constitutional concerns. Furthermore, in contrast to the limited nature of doctor-patient counseling provided for in Rust, the regulations, as interpreted by LSC's counsel, broadly promote the lawyer-client relationship by providing that the lawyer may counsel the client, refer the client to another attorney, and explain to the client that LSC restrictions preclude the lawyer from engaging in the activity the client may wish to undertake. The Court will take the LSC at its word and will take a critical view, as other courts should as well, of any restrictions on such basic lawyering, in addition to any unreasonable rejections of recipients' certificates of compliance with the program integrity requirements, if such issues should arise in any future "as applied" litigation.

In respect to plaintiffs' rather casual due process and equal protection claims, their due process argument fails for the same reasons the analogous claim failed in Rust — namely, because plaintiffs are not absolutely precluded from engaging in prohibited activities and, furthermore, have no constitutional entitlement to the benefits provided by the legal services program. 500 U.S. at 201-02, 111 S.Ct. at 1776-77. The Court rejects plaintiffs' equal protection argument since, as explained throughout this decision, the Government had a rational basis for restricting the activities of recipients, and because poverty is not a suspect classification. See LASH II, 981 F.Supp. at 1300; see also Maher v. Roe, 432 U.S.

464, 471, 97 S.Ct. 2376, 2380, 53 L.Ed.2d 484 (1977) ("this Court has never held that financial need alone identifies a suspect class for purposes of equal protection" analysis).

CONCLUDING COMMENTS

This is not the same case that first came to the Court. It was entirely plausible for plaintiffs to initially challenge the constitutionality of the laundry list of prohibited activities wrought by the Act. Regardless of whether the Court would have agreed with all or any part of its sister court's constitutional conclusions in LASH I, this litigation, as plaintiffs have acknowledged, took on vastly different contours once the LSC responded to the compelling concerns raised in LASH I by enacting the interim regulations, and further responded in its final regulations to the plaintiffs' concerns regarding the interim regulations and to the Court's entreaties during the course of the litigation. In many ways, the litigation stands as a testament to the continued vibrancy and vitality of the very First Amendment rights at the heart of this lawsuit — access to the courts, free and open public debate, and freedom to associate for the vindication of legal rights. It also reflects the value of advocacy in the judicial setting by protagonists acting at the highest level of the legal profession. In that regard, plaintiffs are commended for bringing and furthering this litigation; defendants are commended for appropriately addressing plaintiffs' concerns.

CONCLUSION

Plaintiffs have failed to establish a probability of success on the merits of their facial constitutional challenge, and their preliminary injunction motion is therefore denied.

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 8, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of July, one thousand nine hundred and ninety-nine.

No. 98-6006

CARMEN VELAZQUEZ et al.,

Plaintiffs-Appellants,

– v. –

LEGAL SERVICES CORPORATION,

Defendant-Appellee,

UNITED STATES OF AMERICA,

Intervenor-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellees Legal Services Corporation, Intervenor-Appellee United States of America and the appellants Carmen Velazquez et al.

Appendix C

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that a request for an en banc vote having been made by a judge of the panel that heard the appeal, and a poll of the judges in regular active service having been taken and there being no majority in favor thereof, rehearing in banc is DENIED.

FOR THE COURT:
KAREN GREVE MILTON,
Acting Clerk

s/ Ralph A. Anderson 7/8/99
By: Date
RALPH A. ANDERSON,
DEPUTY CLERK
ACTING OPERATIONS
MANAGER

APPENDIX D — CONSTITUTIONAL PROVISION INVOLVED

CONSTITUTION OF THE UNITED STATES AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX E — STATUTES AND REGULATIONS INVOLVED

UNITED STATES PUBLIC LAWS
104th Congress — Second Session
Convening January 3, 1996

PL 104-134 (HR 3019)
April 26, 1996
OMNIBUS CONSOLIDATED RESCISSIONS AND APPROPRIATIONS ACT OF 1996

An Act making appropriations for fiscal year 1996 to make a further downpayment toward a balanced budget, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 101. For programs, projects or activities in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1996, provided as follows, to be effective as if it had been enacted into law as the regular appropriations Act:

AN ACT

Making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 1996, and for other purposes.

TITLE I

* * *

Appendix E

ADMINISTRATIVE PROVISIONS — LEGAL SERVICES CORPORATION

SEC. 501. (a) Funds appropriated under this Act to the Legal Services Corporation for basic field programs shall be distributed as follows:

(1) The Corporation shall define geographic areas and make the funds available for each geographic area on a per capita basis relative to the number of individuals in poverty determined by the Bureau of the Census to be within the geographic area, except as provided in paragraph (2)(B). Funds for such a geographic area may be distributed by the Corporation to 1 or more persons or entities eligible for funding under section 1006(a)(1)(A) of the Legal Services Corporation Act (42 U.S.C. 2996e(a)(1)(A)), subject to sections 502 and 504.

(2) Funds for grants from the Corporation, and contracts entered into by the Corporation for basic field programs, shall be allocated so as to provide —

(A) except as provided in subparagraph (B), an equal figure per individual in poverty for all geographic areas, as determined on the basis of the most recent decennial census of population conducted pursuant to section 141 of title 13, United States Code (or, in the case of the Republic of Palau, the Federated States of Micronesia, the

Appendix E

Republic of the Marshall Islands, Alaska, Hawaii, and the United States Virgin Islands, on the basis of the adjusted population counts historically used as the basis for such determinations); and

(B) an additional amount for Native American communities that received assistance under the Legal Services Corporation Act for fiscal year 1995, so that the proportion of the funds appropriated to the Legal Services Corporation for basic field programs for fiscal year 1996 that is received by the Native American communities shall be not less than the proportion of such funds appropriated for fiscal year 1995 that was received by the Native American communities.

(b) As used in this section:

(1) The term "individual in poverty" means an individual who is a member of a family (of 1 or more members) with an income at or below the poverty line.

(2) The term "poverty line" means the poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section 673(2) of the Community Services Block Grant Act (42 U.S.C. 9902(2)) applicable to a family of the size involved.

Appendix E

SEC. 502. None of the funds appropriated in this Act to the Legal Services Corporation shall be used by the Corporation to make a grant, or enter into a contract, for the provision of legal assistance unless the Corporation ensures that the person or entity receiving funding to provide such legal assistance is —

(1) a private attorney admitted to practice in a State or the District of Columbia;

(2) a qualified nonprofit organization, chartered under the laws of a State or the District of Columbia, that —

(A) furnishes legal assistance to eligible clients; and

(B) is governed by a board of directors or other governing body, the majority of which is comprised of attorneys who —

(i) are admitted to practice in a State or the District of Columbia; and

(ii) are appointed to terms of office on such board or body by the governing body of a State, county, or municipal bar association, the membership of which represents a majority of the attorneys practicing law in the locality in which the

organization is to provide legal assistance;

(3) a State or local government (without regard to section 1006(a)(1)(A)(ii) of the Legal Services Corporation Act (42 U.S.C. 2996e(a)(1)(A)(ii)); or

(4) a substate regional planning or coordination agency that serves a substate area and whose governing board is controlled by locally elected officials.

SEC. 503. (a)(1) Not later than April 1, 1996, the Legal Services Corporation shall implement a system of competitive awards of grants and contracts for all basic field programs, which shall apply to all such grants and contracts awarded by the Corporation after March 31, 1996, from funds appropriated in this Act.

(2) Any grant or contract awarded before April 1, 1996, by the Legal Services Corporation to a basic field program for 1996 —

(A) shall not be for an amount greater than the amount required for the period ending March 31, 1996;

(B) shall terminate at the end of such period; and

(C) shall not be renewable except in accordance with the system implemented under paragraph (1).

(3) The amount of grants and contracts awarded before April 1, 1996, by the Legal Services Corporation for basic field programs for 1996 in any geographic area described in section 501 shall not exceed an amount equal to 3/12 of the total amount to be distributed for such programs for 1996 in such area.

(b) Not later than 60 days after the date of enactment of this Act, the Legal Services Corporation shall promulgate regulations to implement a competitive selection process for the recipients of such grants and contracts.

(c) Such regulations shall specify selection criteria for the recipients, which shall include —

(1) a demonstration of a full understanding of the basic legal needs of the eligible clients to be served and a demonstration of the capability of serving the needs;

(2) the quality, feasibility, and cost effectiveness of a plan submitted by an applicant for the delivery of legal assistance to the eligible clients to be served; and

(3) the experience of the Legal Services Corporation with the applicant, if the applicant has previously received financial assistance from the Corporation, including the record of the applicant of past compliance with Corporation policies, practices, and restrictions.

(d) Such regulations shall ensure that timely notice regarding an opportunity to submit an application for such an award is published in periodicals of local and State bar associations and in at least 1 daily newspaper of general circulation in the area to be served by the person or entity receiving the award.

(e) No person or entity that was previously awarded a grant or contract by the Legal Services Corporation for the provision of legal assistance may be given any preference in the competitive selection process.

(f) For the purposes of the funding provided in this Act, rights under sections 1007(a)(9) and 1011 of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(9) and 42 U.S.C. 2996j) shall not apply.

SEC. 504. (a) None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity (which may be referred to in this section as a "recipient") —

> (1) that makes available any funds, personnel, or equipment for use in advocating or opposing any plan or proposal, or represents any party or participates in any other way in litigation, that is intended to or has the effect of altering, revising, or reapportioning a legislative, judicial, or elective district at any level of government, including influencing the timing or manner of the taking of a census;

(2) that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State, or local agency;

(3) that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect;

(4) that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body;

(5) that attempts to influence the conduct of oversight proceedings of the Corporation or any person or entity receiving financial assistance provided by the Corporation;

(6) that pays for any personal service, advertisement, telegram, telephone communication, letter, printed or written matter, administrative expense, or related expense, associated with an activity prohibited in this section;

(7) that initiates or participates in a class action suit;

(8) that files a complaint or otherwise initiates or participates in litigation against a defendant, or engages in a precomplaint settlement negotiation with a prospective defendant, unless —

(A) each plaintiff has been specifically identified, by name, in any complaint filed for purposes of such litigation or prior to the precomplaint settlement negotiation; and

(B) a statement or statements of facts written in English and, if necessary, in a language that the plaintiffs understand, that enumerate the particular facts known to the plaintiffs on which the complaint is based, have been signed by the plaintiffs, are kept on file by the recipient, and are made available to any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and to any auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation: Provided, That upon establishment of reasonable cause that an injunction is necessary to prevent probable, serious harm to such potential plaintiff, a court of competent jurisdiction may enjoin the disclosure of the identity of any potential plaintiff pending the outcome of such

litigation or negotiations after notice and an opportunity for a hearing is provided to potential parties to the litigation or the negotiations: Provided further, That other parties to the litigation or negotiation shall have access to the statement of facts referred to in subparagraph (B) only through the discovery process after litigation has begun;

(9) unless —

(A) prior to the provision of financial assistance —

(i) if the person or entity is a nonprofit organization, the governing board of the person or entity has set specific priorities in writing, pursuant to section 1007(a)(2)(C)(i) of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(2)(C)(i)), of the types of matters and cases to which the staff of the nonprofit organization shall devote time and resources; and

(ii) the staff of such person or entity has signed a written agreement not to undertake cases or matters other than in accordance

with the specific priorities set by such governing board, except in emergency situations defined by such board and in accordance with the written procedures of such board for such situations; and

(B) the staff of such person or entity provides to the governing board on a quarterly basis, and to the Corporation on an annual basis, information on all cases or matters undertaken other than cases or matters undertaken in accordance with such priorities;

(10) unless —

(A) prior to receiving the financial assistance, such person or entity agrees to maintain records of time spent on each case or matter with respect to which the person or entity is engaged;

(B) any funds, including Interest on Lawyers Trust Account funds, received from a source other than the Corporation by the person or entity, and disbursements of such funds, are accounted for and reported as receipts and disbursements, respectively, separate and distinct from Corporation funds; and

(C) the person or entity agrees (notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)) to make the records described in this paragraph available to any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and to any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation;

(11) that provides legal assistance for or on behalf of any alien, unless the alien is present in the United States and is —

(A) an alien lawfully admitted for permanent residence as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20));

(B) an alien who —

(i) is married to a United States citizen or is a parent or an unmarried child under the age of 21 years of such a citizen; and

(ii) has filed an application to adjust the status of the alien to the status of a lawful permanent

resident under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.), which application has not been rejected;

(C) an alien who is lawfully present in the United States pursuant to an admission under section 207 of the Immigration and Nationality Act (8 U.S.C. 1157) (relating to refugee admission) or who has been granted asylum by the Attorney General under such Act;

(D) an alien who is lawfully present in the United States as a result of withholding of deportation by the Attorney General pursuant to section 243(h) of the Immigration and Nationality Act (8 U.S.C. 1253(h));

(E) an alien to whom section 305 of the Immigration Reform and Control Act of 1986 (8 U.S.C. 1101 note) applies, but only to the extent that the legal assistance provided is the legal assistance described in such section; or

(F) an alien who is lawfully present in the United States as a result of being granted conditional entry to the United States before April 1, 1980, pursuant to section 203(a)(7) of the Immigration and Nationality Act (8

U.S.C. 1153(a)(7)), as in effect on March 31, 1980, because of persecution or fear of persecution on account of race, religion, or political calamity;

(12) that supports or conducts a training program for the purpose of advocating a particular public policy or encouraging a political activity, a labor or antilabor activity, a boycott, picketing, a strike, or a demonstration, including the dissemination of information about such a policy or activity, except that this paragraph shall not be construed to prohibit the provision of training to an attorney or a paralegal to prepare the attorney or paralegal to provide —

(A) adequate legal assistance to eligible clients; or

(B) advice to any eligible client as to the legal rights of the client;

(13) that claims (or whose employee claims), or collects and retains, attorneys' fees pursuant to any Federal or State law permitting or requiring the awarding of such fees;

(14) that participates in any litigation with respect to abortion;

(15) that participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison;

(16) that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation;

(17) that defends a person in a proceeding to evict the person from a public housing project if —

(A) the person has been charged with the illegal sale or distribution of a controlled substance; and

(B) the eviction proceeding is brought by a public housing agency because the illegal drug activity of the person threatens the health or safety of another tenant residing in the public housing project or employee of the public housing agency;

(18) unless such person or entity agrees that the person or entity, and the employees of the person or entity, will not accept employment resulting from in-person unsolicited advice to a nonattorney that such nonattorney should obtain counsel or take legal action, and will not refer such nonattorney to another person or entity or an employee of the person or

entity, that is receiving financial assistance provided by the Corporation; or

(19) unless such person or entity enters into a contractual agreement to be subject to all provisions of Federal law relating to the proper use of Federal funds, the violation of which shall render any grant or contractual agreement to provide funding null and void, and, for such purposes, the Corporation shall be considered to be a Federal agency and all funds provided by the Corporation shall be considered to be Federal funds provided by grant or contract.

(b) Nothing in this section shall be construed to prohibit a recipient from using funds from a source other than the Legal Services Corporation for the purpose of contacting, communicating with, or responding to a request from, a State or local government agency, a State or local legislative body or committee, or a member thereof, regarding funding for the recipient, including a pending or proposed legislative or agency proposal to fund such recipient.

(c) Not later than 30 days after the date of enactment of this Act, the Legal Services Corporation shall promulgate a suggested list of priorities that boards of directors may use in setting priorities under subsection (a)(9).

(d)(1) The Legal Services Corporation shall not accept any non-Federal funds, and no recipient shall accept funds from any source other than the Corporation, unless the Corporation or the recipient, as the case may be, notifies in writing the source of the funds that the funds may not be

expended for any purpose prohibited by the Legal Services Corporation Act or this title.

(2) Paragraph (1) shall not prevent a recipient from —

(A) receiving Indian tribal funds (including funds from private nonprofit organizations for the benefit of Indians or Indian tribes) and expending the tribal funds in accordance with the specific purposes for which the tribal funds are provided; or

(B) using funds received from a source other than the Legal Services Corporation to provide legal assistance to a covered individual if such funds are used for the specific purposes for which such funds were received, except that such funds may not be expended by recipients for any purpose prohibited by this Act or by the Legal Services Corporation Act.

(e) Nothing in this section shall be construed to prohibit a recipient from using funds derived from a source other than the Legal Services Corporation to comment on public rulemaking or to respond to a written request for information or testimony from a Federal, State or local agency, legislative body or committee, or a member of such an agency, body, or committee, so long as the response is made only to the parties that make the request and the recipient does not arrange for the request to be made.

(f) As used in this section:

(1) The term "controlled substance" has the meaning given the term in section 102 of the Controlled Substances Act (21 U.S.C. 802).

(2) The term "covered individual" means any person who —

(A) except as provided in subparagraph (B), meets the requirements of this Act and the Legal Services Corporation Act relating to eligibility for legal assistance; and

(B) may or may not be financially unable to afford legal assistance.

(3) The term "public housing project" has the meaning as used within, and the term "public housing agency" has the meaning given the term, in section 3 of the United States Housing Act of 1937 (42 U.S.C. 1437a).

SEC. 505. None of the funds appropriated in this Act to the Legal Services Corporation or provided by the Corporation to any entity or person may be used to pay membership dues to any private or nonprofit organization.

SEC. 506. None of the funds appropriated in this Act to the Legal Services Corporation may be used by any person or entity receiving financial assistance from the Corporation to file or pursue a lawsuit against the Corporation.

Appendix E

SEC. 507. None of the funds appropriated in this Act to the Legal Services Corporation may be used for any purpose prohibited or contrary to any of the provisions of authorization legislation for fiscal year 1996 for the Legal Services Corporation that is enacted into law. Upon the enactment of such Legal Services Corporation reauthorization legislation, funding provided in this Act shall from that date be subject to the provisions of that legislation and any provisions in this Act that are inconsistent with that legislation shall no longer have effect.

SEC. 508. (a) The requirements of section 504 shall apply to the activities of a recipient described in section 504, or an employee of such a recipient, during the provision of legal assistance for a case or matter, if the recipient or employee begins to provide the legal assistance on or after the date of enactment of this Act.

(b) If the recipient or employee began to provide legal assistance for the case or matter prior to the date of enactment of this Act —

(1) each of the requirements of section 504 (other than paragraphs (7), (11), (13), and (15) of subsection (a) of such section) shall, beginning on the date of enactment of this Act, apply to the activities of the recipient or employee during the provision of legal assistance for the case or matter;

(2) the requirements of paragraphs (7), (11), and (15) of section 504(a) shall apply —

(A) beginning on the date of enactment of this Act, to the activities of the recipient or employee during the provision of legal assistance for any additional related claim for which the recipient or employee begins to provide legal assistance on or after such date; and

(B) beginning August 1, 1996, to all other activities of the recipient or employee during the provision of legal assistance for the case or matter; and

(3) the requirements of paragraph (13) of section 504(a) —

(A) shall apply beginning on the date of enactment of this Act to the activities of the recipient or employee during the provision of legal assistance for any additional related claim for which the recipient or employee begins to provide legal assistance on or after such date; and

(B) shall not apply to all other activities of the recipient or employee during the provision of legal assistance for the case or matter.

(c) The Legal Services Corporation shall, every 60 days, submit to the Committees on Appropriations of the Senate and House of Representatives a report setting forth the status of cases and matters referred to in subsection (b)(2).

Appendix E

SEC. 509. (a) An audit of each person or entity receiving financial assistance from the Legal Services Corporation under this Act (referred to in this section as a "recipient") shall be conducted in accordance with generally accepted government auditing standards and guidance established by the Office of the Inspector General and shall report whether —

(1) the financial statements of the recipient present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles;

(2) the recipient has internal control systems to provide reasonable assurance that it is managing funds, regardless of source, in compliance with Federal laws and regulations; and

(3) the recipient has complied with Federal laws and regulations applicable to funds received, regardless of source.

(b) In carrying out the requirements of subsection (a)(3), the auditor shall select and test a representative number of transactions and report all instances of noncompliance to the recipient. The recipient shall report in writing any noncompliance found by the auditor during the audit under this section within 5 business days to the Office of the Inspector General and shall provide a copy of the report simultaneously to the auditor. If the recipient fails to report the noncompliance, the auditor shall report the noncompliance directly to the Office of the Inspector General within 5 business days of the recipient's failure to report. The auditor shall not be liable in a private action for any

finding, conclusion, or statement expressed in a report made pursuant to this section.

(c) The audits required under this section shall be provided for by the recipients and performed by independent public accountants. The cost of such audits shall be shared on a pro rata basis among all of the recipient's funding providers and the appropriate share shall be an allowable charge to the Federal funds provided by the Legal Services Corporation. No audit costs may be charged to the Federal funds when the audit required by this section has not been made in accordance with the guidance promulgated by the Office of the Inspector General.

If the recipient fails to have an acceptable audit in accordance with the guidance promulgated by the Office of the Inspector General, the following sanctions shall be available to the Corporation as recommended by the Office of the Inspector General:

(1) The withholding of a percentage of the recipient's funding until the audit is completed satisfactorily.

(2) The suspension of recipient's funding until an acceptable audit is completed.

(d) The Office of the Inspector General may remove, suspend, or bar an independent public accountant, upon a showing of good cause, from performing audit services required by this section. Any such action to remove, suspend, or bar an auditor shall be only after notice to the auditor and an opportunity for hearing. The Office of the Inspector

General shall develop and issue rules of practice to implement this paragraph.

(e) Any independent public accountant performing an audit under this section who subsequently ceases to be the accountant for the recipient shall promptly notify the Office of the Inspector General pursuant to such rules as the Office of the Inspector General shall prescribe.

(f) Audits conducted in accordance with this section shall be in lieu of the financial audits otherwise required by section 1009(c) of the Legal Services Corporation Act (42 U.S.C. 2996h(c)).

(g) The Office of the Inspector General is authorized to conduct on-site monitoring, audits, and inspections in accordance with Federal standards.

(h) Notwithstanding section 1006(b)(3) of the Legal Services Corporation Act (42 U.S.C. 2996e(b)(3)), financial records, time records, retainer agreements, client trust fund and eligibility records, and client names, for each recipient shall be made available to any auditor or monitor of the recipient, including any Federal department or agency that is auditing or monitoring the activities of the Corporation or of the recipient, and any independent auditor or monitor receiving Federal funds to conduct such auditing or monitoring, including any auditor or monitor of the Corporation, except for reports or records subject to the attorney-client privilege.

(i) The Legal Services Corporation shall not disclose any name or document referred to in subsection (h), except to —

(1) a Federal, State, or local law enforcement official; or

(2) an official of an appropriate bar association for the purpose of enabling the official to conduct an investigation of a rule of professional conduct.

(j) The recipient management shall be responsible for expeditiously resolving all reported audit reportable conditions, findings, and recommendations, including those of sub-recipients.

(k) The Legal Services Corporation shall —

(1) follow up on significant reportable conditions, findings, and recommendations found by the independent public accountants and reported to Corporation management by the Office of the Inspector General to ensure that instances of deficiencies and noncompliance are resolved in a timely manner, and

(2) Develop procedures to ensure effective follow-up that meet at a minimum the requirements of Office of Management and Budget Circular Number A-50.

(l) The requirements of this section shall apply to a recipient for its first fiscal year beginning on or after January 1, 1996.

* * *

Appendix E

UNITED STATES PUBLIC LAWS
104th Congress — Second Session
Convening January 3, 1996

PL 104-208 (HR 3610)
September 30, 1996
OMNIBUS CONSOLIDATED APPROPRIATIONS ACT, 1997

An Act making omnibus consolidated appropriations for the fiscal year ending September 30, 1997, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DIVISION A

That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the several departments, agencies, corporations and other organizational units of the Government for the fiscal year 1997, and for other purposes, namely:

TITLE I — OMNIBUS APPROPRIATIONS

SEC. 101. (a) For programs, projects or activities in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1997, provided as follows, to be effective as if it had been enacted into law as the regular appropriations Act:

Appendix E

AN ACT

Making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 1997, and for other purposes.

TITLE I

* * *

LEGAL SERVICES CORPORATION
PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, as amended, $283,000,000, of which $274,400,000 is for basic field programs and required independent audits; $1,500,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; and $7,100,000 is for management and administration.

ADMINISTRATIVE PROVISIONS — LEGAL SERVICES CORPORATION

SEC. 501. (a) CONTINUATION OF COMPETITIVE SELECTION PROCESS. — None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity except through a competitive selection process conducted in accordance with regulations promulgated by the Corporation

in accordance with the criteria set forth in subsections (c), (d), and (e) of section 503 of Public Law 104-134 (110 Stat. 1321-52 et seq.).

(b) INAPPLICABILITY OF NONCOMPETITIVE PROCEDURES. — For purposes of the funding provided in this Act, rights under sections 1007(a)(9) and 1011 of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(9) and 42 U.S.C. 2996j) shall not apply.

SEC. 502. (a) CONTINUATION OF REQUIREMENTS AND RESTRICTIONS. — None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of —

(1) sections 501, 502, 505, 506, and 507 of Public Law 104-134 (110 Stat. 1321-51 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions as set forth in such sections, except that all references in such sections to 1995 and 1996 shall be deemed to refer instead to 1996 and 1997, respectively; and

(2) section 504 of Public Law 104-134 (110 Stat. 1321-53 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such section, except that —

(A) subsection (c) of such section 504 shall not apply;

(B) paragraph (3) of section 508(b) of Public Law 104-134 (110 Stat. 1321-58) shall apply with respect to the requirements of subsection (a)(13) of such section 504, except that all references in such section 508(b) to the date of enactment shall be deemed to refer to April 26, 1996; and

(C) subsection (a)(11) of such section 504 shall not be construed to prohibit a recipient from using funds derived from a source other than the Corporation to provide related legal assistance to —

(i) an alien who has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty; or

(ii) an alien whose child has been battered or subjected to extreme cruelty in the United States by a spouse or parent of the alien (without the active participation of the alien in the battery or extreme cruelty), or by a member of the spouse's or parent's family residing in the

same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, and the alien did not actively participate in such battery or cruelty.

(b) DEFINITIONS. — For purposes of subsection (a)(2)(C):

(1) The term "battered or subjected to extreme cruelty" has the meaning given such term under regulations issued pursuant to subtitle G of the Violence Against Women Act of 1994 (Pub.L. 103-322; 108 Stat. 1953).

(2) The term "related legal assistance" means legal assistance directly related to the prevention of, or obtaining of relief from, the battery or cruelty described in such subsection.

SEC. 503. (a) CONTINUATION OF AUDIT REQUIREMENTS. — The requirements of section 509 of Public Law 104-134 (110 Stat. 1321-58 et seq.), other than subsection (l) of such section, shall apply during fiscal year 1997.

(b) REQUIREMENT OF ANNUAL AUDIT. — An annual audit of each person or entity receiving financial assistance from the Legal Services Corporation under this Act shall be conducted during fiscal year 1997 in accordance with the requirements referred to in subsection (a).

* * *

Appendix E

UNITED STATES PUBLIC LAWS
105th Congress — First Session
Convening January 7, 1997

PL 105-119 (HR 2267)
November 26, 1997
DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATIONS ACT, 1998

An Act making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 1998, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending September 30, 1998, and for other purposes, namely:

TITLE I

* * *

LEGAL SERVICES CORPORATION
PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of

1974, as amended, $283,000,000, of which $274,400,000 is for basic field programs and required independent audits; $1,500,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; and $7,100,000 is for management and administration.

ADMINISTRATIVE PROVISIONS — LEGAL SERVICES CORPORATION

SEC. 501. (a) CONTINUATION OF COMPETITIVE SELECTION PROCESS. — None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity except through a competitive selection process conducted in accordance with regulations promulgated by the Corporation in accordance with the criteria set forth in subsections (c), (d), and (e) of section 503 of Public Law 104-134 (110 Stat. 1321-52 et seq.).

(b) INAPPLICABILITY OF CERTAIN PROCEDURES. — Sections 1007(a)(9) and 1011 of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(9) and 2996j) shall not apply to the provision, denial, suspension, or termination of any financial assistance using funds appropriated in this Act.

(c) ADDITIONAL PROCEDURES. — If, during any term of a grant or contract awarded to a recipient by the Legal Services Corporation under the competitive selection process referred to in subsection (a) and applicable Corporation regulations, the Corporation finds, after notice and opportunity for the recipient to be heard, that the recipient

has failed to comply with any requirement of the Legal Services Corporation Act (42 U.S.C. 2996 et seq.), this Act, or any other applicable law relating to funding for the Corporation, the Corporation may terminate the grant or contract and institute a new competitive selection process for the area served by the recipient, notwithstanding the terms of the recipient's grant or contract.

SEC. 502. (a) CONTINUATION OF REQUIREMENTS AND RESTRICTIONS. — None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of —

(1) sections 501, 502, 505, 506, and 507 of Public Law 104-134 (110 Stat. 1321-51 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions as set forth in such sections, except that all references in such sections to 1995 and 1996 shall be deemed to refer instead to 1997 and 1998, respectively; and

(2) section 504 of Public Law 104-134 (110 Stat. 1321-53 et seq.), and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such section, except that —

(A) subsection (c) of such section 504 shall not apply;

(B) paragraph (3) of section 508(b) of Public Law 104-134 (110 Stat. 1321-58) shall apply with respect to the requirements of subsection (a)(13) of such section 504, except that all references in such section 508(b) to the date of enactment shall be deemed to refer to April 26, 1996; and

(C) subsection (a)(11) of such section 504 shall not be construed to prohibit a recipient from using funds derived from a source other than the Corporation to provide related legal assistance to —

> (i) an alien who has been battered or subjected to extreme cruelty in the United States by a spouse or a parent, or by a member of the spouse's or parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty; or
>
> (ii) an alien whose child has been battered or subjected to extreme cruelty in the United States by a spouse or parent of the alien (without the active participation of the alien in the battery or extreme cruelty), or by a member of the spouse's or

parent's family residing in the same household as the alien and the spouse or parent consented or acquiesced to such battery or cruelty, and the alien did not actively participate in such battery or cruelty.

(b) DEFINITIONS. — For purposes of subsection (a)(2)(C):

(1) The term "battered or subjected to extreme cruelty" has the meaning given such term under regulations issued pursuant to subtitle G of the Violence Against Women Act of 1994 (Public Law 103-322; 108 Stat. 1953).

(2) The term "related legal assistance" means legal assistance directly related to the prevention of, or obtaining of relief from, the battery or cruelty described in such subsection.

SEC. 503. (a) CONTINUATION OF AUDIT REQUIREMENTS. — The requirements of section 509 of Public Law 104-134 (110 Stat. 1321-58 et seq.), other than subsection (l) of such section, shall apply during fiscal year 1998.

(b) REQUIREMENT OF ANNUAL AUDIT. — An annual audit of each person or entity receiving financial assistance from the Legal Services Corporation under this Act shall be conducted during fiscal year 1998 in accordance with the requirements referred to in subsection (a).

Appendix E

SEC. 504. (a) DEBARMENT. — The Legal Services Corporation may debar a recipient, on a showing of good cause, from receiving an additional award of financial assistance from the Corporation. Any such action to debar a recipient shall be instituted after the Corporation provides notice and an opportunity for a hearing to the recipient.

(b) REGULATIONS. — The Legal Services Corporation shall promulgate regulations to implement this section.

(c) GOOD CAUSE. — In this section, the term "good cause", used with respect to debarment, includes —

(1) prior termination of the financial assistance of the recipient, under part 1640 of title 45, Code of Federal Regulations (or any similar corresponding regulation or ruling);

(2) prior termination in whole, under part 1606 of title 45, Code of Federal Regulations (or any similar corresponding regulation or ruling), of the most recent financial assistance received by the recipient, prior to date of the debarment decision;

(3) substantial violation by the recipient of the statutory or regulatory restrictions that prohibit recipients from using financial assistance made available by the Legal Services Corporation or other financial assistance for purposes prohibited under the Legal Services Corporation Act (42 U.S.C. 2996 et seq.) or for involvement in any activity prohibited by, or inconsistent with, section 504 of Public Law

104-134 (110 Stat. 1321-53 et seq.), section 502(a)(2) of Public Law 104-208 (110 Stat. 3009-59 et seq.), or section 502(a)(2) of this Act;

(4) knowing entry by the recipient into a subgrant, subcontract, or other agreement with an entity that had been debarred by the Corporation; or

(5) the filing of a lawsuit by the recipient, on behalf of the recipient, as part of any program receiving any Federal funds, naming the Corporation, or any agency or employee of a Federal, State, or local government, as a defendant.

SEC. 505. (a) Not later than January 1, 1998, the Legal Services Corporation shall implement a system of case information disclosure which shall apply to all basic field programs which receive funds from the Legal Services Corporation from funds appropriated in this Act.

(b) Any basic field program which receives Federal funds from the Legal Services Corporation from funds appropriated in this Act must disclose to the public in written form, upon request, and to the Legal Services Corporation in semiannual reports, the following information about each case filed by its attorneys in any court:

(1) The name and full address of each party to the legal action unless such information is protected by an order or rule of a court or by State or Federal law or revealing such information would put the client of the recipient of such Federal funds at risk of physical harm.

(2) The cause of action in the case.

(3) The name and address of the court in which the case was filed and the case number assigned to the legal action.

(c) The case information disclosed in semiannual reports to the Legal Services Corporation shall be subject to disclosure under section 552 of title 5, United States Code.

SEC. 506. In establishing the income or assets of an individual who is a victim of domestic violence, under section 1007(a)(2) of the Legal Services Corporation Act (42 U.S.C. 2996f(a)(2)), to determine if the individual is eligible for legal assistance, a recipient described in such section shall consider only the assets and income of the individual, and shall not include any jointly held assets.

* * *

Appendix E

UNITED STATES PUBLIC LAWS
105th Congress — Second Session
Convening January 27, 1998

PL 105-277 (HR 4328)
October 21, 1998
OMNIBUS CONSOLIDATED AND EMERGENCY SUPPLEMENTAL APPROPRIATIONS ACT, 1999

An Act making omnibus consolidated and emergency appropriations for the fiscal year ending September 30, 1999, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DIVISION A—OMNIBUS CONSOLIDATED APPROPRIATIONS

That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the several departments, agencies, corporations and other organizational units of the Government for the fiscal year 1999, and for other purposes, namely:

* * *

LEGAL SERVICES CORPORATION
PAYMENT TO THE LEGAL SERVICES CORPORATION

For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of

1974, as amended, $300,000,000, of which $289,000,000 is for basic field programs and required independent audits; $2,015,000 is for the Office of Inspector General, of which such amounts as may be necessary may be used to conduct additional audits of recipients; and $8,985,000 is for management and administration.

ADMINISTRATIVE PROVISION — LEGAL SERVICES CORPORATION

None of the funds appropriated in this Act to the Legal Services Corporation shall be expended for any purpose prohibited or limited by, or contrary to any of the provisions of, sections 501, 502, 503, 504, 505, and 506 of Public Law 105-119, and all funds appropriated in this Act to the Legal Services Corporation shall be subject to the same terms and conditions set forth in such sections, except that all references in sections 502 and 503 to 1997 and 1998 shall be deemed to refer instead to 1998 and 1999, respectively.

* * *

Appendix E

Federal Register
May 21, 1997
Volume 62, Number 98, Pages 27695-27700

Legal Services Corporation
45 CFR Part 1610

Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity

Agency: Legal Services Corporation

Action: Final Rule

SUMMARY: This final rule revises the Legal Services Corporation's ("Corporation" or "LSC") interim rule concerning the use of non-LSC funds by LSC recipients. The revisions are intended to address constitutional challenges while ensuring that no LSC-funded entity engages in restricted activities. This final rule continues the interim rule's deletion of the provisions on transfers of non-LSC funds and revises the interim rule's new section that sets out standards for the integrity of recipient programs. The final rule also makes several conforming revisions, including changes to definitions and section titles.

EFFECTIVE DATE: This final rule is effective June 20, 1997.

FOR FURTHER INFORMATION CONTACT: Office of the General Counsel, (202) 336-8817.

Appendix E

SUPPLEMENTARY INFORMATION: On December 2, 1996, the Corporation published a completely revised final rule to implement Section 504 in the Corporation's FY 1996 appropriations act, Pub. L. 104-134, 110 Stat. 1321 (1996), as incorporated by the Corporation's FY 1997 appropriations act, Pub. L. 104-208, 110 Stat. 3009. Section 504 applies certain restrictions to any person or entity receiving LSC funds, effectively restricting the use of virtually all of a recipient's funds to the same degree that it restricts LSC funds.

Although not required to by law, the Corporation extended the restrictions on a recipient's funds to a transfer of a recipient's non-LSC funds. Thus, the rule required that when a recipient transferred its non-LSC funds to an entity that had no LSC funds, the conditions would remain attached to the transferred funds. However, the other funds of the entity would not be affected.

In January 1997, five legal services recipients in Hawaii, Alaska, and California, together with two of their program lawyers, two non-federal funders and a client organization, filed suit in the United States District Court for the District of Hawaii challenging a number of the Section 504 restrictions as unconstitutional conditions on their use of non-LSC funds. Legal Aid Society of Hawaii et al. v. Legal Services Corporation, Civil Action No. 97-00032 ACK, (hereinafter referred to as LASH). The Court entered an order on February 14, 1997, which preliminarily enjoined the Corporation from enforcing restrictions on the recipients' use of non-LSC funds for certain restrictions as to which the Court determined that the plaintiffs had a fair likelihood of

demonstrating an infringement of First Amendment rights. (The Court denied the preliminary injunction request with respect to certain other restrictions, including those relating to class actions and representation of ineligible aliens.) The Court's preliminary ruling was grounded in pertinent part on its understanding of the Corporation's interrelated organization policy, but also implicated the expansive reach of the Corporation's restrictions on non-LSC funds. The effect of the preliminary order was to allow those recipients who are plaintiffs in the case to use their non-LSC funds to engage in certain prohibited activities within their recipient programs during the interim period before a trial on the merits and a final ruling by the judge.

A similar suit to LASH was also filed in January 1997, as a class action in the United States District Court for the Eastern District of New York, which sought, inter alia, to have the court declare certain restrictions unconstitutional and grant preliminary and final injunctive relief. Velazquez et al v. Legal Services Corporation, 97 Civ. 00182(FB) (E.D.N.Y). There has been no ruling or order issued to date.

Because the Court's order in LASH created a situation clearly at odds with Congressional intent, the Operations and Regulations Committee ("Committee") of the Corporation's Board of Directors ("Board") held public hearings and considered a draft interim rule on March 7, 1997. The Committee recommended and the Board agreed on March 8, 1997, on an interim rule, which was published in the Federal Register on March 14, 1997, with a request for comments.

Appendix E

The interim rule revised the final rule with the intent of addressing the constitutional concerns raised in LASH while preserving the statutory system created by Congress that forbids recipients from engaging in prohibited activities and subsidizing prohibited activities with LSC funds. Generally, the interim rule deleted provisions in §1610.7 on the transfer of non-LSC funds and added a new §1610.8 dealing with the integrity of recipient programs. Section 1610.8 replaced and nullified Section 1-7 of the Corporation's 1986 Audit and Accounting Guide, which set out the Corporation's policy on interrelated organizations.

The Corporation received three timely comments and several other comments thereafter, each of which was given careful consideration. Based on the comments and its own internal research and review, the Corporation has made several revisions to the interim rule. A section-by-section analysis of this final rule is provided below. The analysis includes explanations of provisions in the December 1996 final rule that remain unchanged by the interim or this final rule.

Section 1610.1 Purpose

The purpose section is intended to reflect Congressional intent that no LSC-funded organization engage in any restricted activities. This final rule adds language clarifying that the purpose of the rule is to ensure that recipients maintain objective integrity and independence from organizations that engage in restricted activities. The term "restricted activities" is used in the preamble and text of this rule as an umbrella term to refer to the restrictions included

in the definitions of "purpose prohibited by the LSC Act" and "activity prohibited by or inconsistent with Section 504."

Section 1610.1 Definitions

This section provides definitions for terms used in this part. Paragraph (a) defines "purpose prohibited by the LSC Act." The December 1996 final rule revised the Corporation's longstanding definition in several ways. This rule deleted reference to a prohibition on the representation of juveniles, because the prohibition is no longer in the LSC Act. This rule also deleted reference to those restrictions on activities in the LSC Act that are now included in the broader restrictions in the Corporation's appropriations act. Numbering changes were also made to conform to 1977 amendments to the LSC Act. These changes have been retained in this rule.

Paragraph (b) defines "activity prohibited by or inconsistent with Section 504" by listing the prohibitions and requirements in Section 504 of the Corporation's FY 1996 appropriations which have been incorporated by reference in the Corporation's FY 1997 appropriations act. These prohibitions and requirements apply to a recipient's activities, regardless of the source of funding. The definition also makes reference to subsections 504(b) and 504(e), which provide exceptions for specific activities supported by non-LSC funds.

This section also includes definitions of "IOLTA funds," "non-LSC funds," "private funds," "public funds," and "tribal funds." No changes in these definitions have been made by this rule.

Appendix E

Changes have been made to the definition of "transfer" to help clarify the meaning of the term and to reflect the deletion of the provisions on transfers of non-LSC funds. Minor changes were made to the first sentence of the definition to clarify that a "transfer" includes payments of LSC funds by a recipient to a person or entity for programmatic activities normally conducted by the recipient, such as the representation of eligible clients. A second sentence is added to clarify what is not included in the term. The additional language provides that a "transfer" does not include payments of LSC funds to vendors, accountants or other providers of goods and services in the normal course of business. The term is now found in the section on program integrity as well as in the section on transfers of LSC funds.

Section 1610.3 Prohibition

This section sets out the prohibition which states that recipients may not use non-LSC funds for any purpose prohibited by the LSC Act or for any activity prohibited by or inconsistent with Section 504, unless authorized by other provisions in this part.

Section 1610.4 Authorized use of non-LSC funds

This section sets out the circumstances where the restrictions in Section 504 and the LSC Act do not apply to certain categories of a recipient's non-LSC funds. Generally, pursuant to §1010(c) of the LSC Act, the restrictions in the LSC Act apply to a recipient's LSC and private funds but do not apply to a recipient's public or tribal funds if they are used for the purposes for which they are provided.

Restrictions in Section 504, however, generally apply to all of a recipient's funds, including public funds. Paragraph (a) clarifies that, under the LSC Act and Section 504, tribal funds may be used for the purposes for which they were provided. Paragraph (b) clarifies that a recipient's public funds are not subject to the restrictions in the LSC Act but are subject to those in Section 504. This section also states that "IOLTA funds" are to be treated the same as public funds. Because a recipient's private funds are subject to the restrictions in both the LSC Act and Section 504, paragraph (c) clarifies that private funds may be used for the purposes for which they were provided, as long as such use is consistent with the restrictions in the LSC Act and Section 504. Finally, paragraph (d) implements an exception in Section 504 which allows recipients to use non-LSC funds for financially ineligible clients, as long as the funds are used for the specific purpose for which they were received and are not used in a manner that violates the LSC Act or Section 504.

Section 1610.5 Notification

This section incorporates the requirement of Section 504(d)(1) of the appropriations act that recipients may not accept funds from non-LSC sources unless they provide written notice to the funders that their funds may not be used in any manner inconsistent with the LSC Act or Section 504. The requirement applies only to cash contributions; recipients are not required to notify persons or organizations who make non-cash donations or volunteer their time or services to the recipient.

The rule contains a de minimis exception which relieves recipients of the notice requirement for individual

contributions of less than $250. This exception is keyed to the level which triggers the IRS reporting requirement. It is not intended to incorporate any IRS instructions and guidelines concerning contributions to charities. It simply recognizes that, because recipients must provide acknowledgments for donations of $250 or more for IRS purposes, it does not constitute any significant additional burden to incorporate the required notification into the acknowledgment.

Generally, notification should be provided before the recipient accepts the funds. Thus, notice should be given during the course of soliciting funds or applying for a grant or contract. However, for unsolicited donations where advance notice is not feasible, notice should be given in the recipient's letter acknowledging the contribution. For contracts and grants awarded prior to the enactment of the restriction, notice should be given prior to acceptance by the recipient of any additional payments.

The notice requirement applies to funds received by recipients as grants, contracts or charitable donations from funders other than the Corporation, which are intended to fund the non-profit work of the recipient. It does not include funds received from sources such as court payment to attorneys for their work under court appointments; nor does it include payments to the recipient for rent, bank interest, or sale of goods, such as manuals.

An exception is provided for tribal funds. The notice requirement would apply only when the tribal funds are in fact restricted. Thus, when a recipient receives tribal funds

to which the restrictions do not apply, no notice is required to the source of the funds.

Section 1610.6 Applicability

This section addresses two distinct situations. First, paragraph (a) clarifies that the prohibitions on criminal proceedings, actions challenging criminal convictions, aliens or prisoner litigation do not apply to a recipient's or subrecipient's separately funded public defender programs or projects. The authority for this provision is found in Section 1010(c) of the LSC Act and is also based on the scope of certain restrictions in Section 504. The restrictions on representation of aliens and prisoners in Section 504 apply only to civil representation and thus do not prohibit criminal representation in public defender programs. Also, although the LSC Act prohibits LSC recipients from engaging in or using resources for any criminal representation, a narrow exception for separately funded public defender programs or projects is provided in Section 1010(c).

Paragraph (b) provides an exception for criminal or related cases accepted by a recipient or subrecipient pursuant to a court appointment.

Section 1610.7 Transfers of LSC funds

This section addresses the applicability of the statutory restrictions listed in §1610.2(a) and (b) when a recipient transfers LSC funds to another person or entity. The statutory restrictions on a recipient's funds in the LSC Act and the Corporation's current appropriations act do not address the

applicability of these provisions when a recipient transfers its LSC funds to another person or entity. However, the Corporation has historically applied such provisions to transfers of a recipient's LSC funds. See 45 CFR parts 1627 and 1632 and Program Letter dated December 11, 1995. This policy reflects the intent of the Corporation that transfers of LSC funds not become a means to circumvent statutory restrictions on those funds.

Paragraph (a) provides that the restrictions listed in §1610.2(a) and (b) will apply to any LSC funds transferred to another person or entity as well as to the non-LSC funds of the person or entity receiving such funds. This requirement is based on the Corporation's interpretation of legislative intent that the statutory conditions on LSC funds attach to a recipient's non-LSC funds and that, in most situations, this should also be the case when LSC funds are transferred by a recipient to another person or entity. Otherwise, recipients would be able to avoid legislative intent by simply transferring their LSC funds to other persons or entities.

Paragraph (b) modifies this requirement in the areas of timekeeping and priorities. The statutory provisions on timekeeping and priorities are administrative requirements more appropriately applicable to a recipient's own use of its funds. The intent is to assure greater accountability for the recipient's use of its funds without imposing unnecessary administrative burdens. Thus, this section applies the administrative requirements on priorities and timekeeping only to the funds transferred and only to the extent to ensure accountability for those funds. The rule requires that entities receiving a transfer of LSC funds must either use the funds

consistent with the recipient's priorities or establish their own priorities for the use of the funds. In regard to timekeeping, the language tracks the statutory requirement so that entities that receive a transfer of LSC funds are required to maintain records of time spent on each case or matter undertaken with the funds transferred. However, they are not required to keep time in accordance with the Corporation's timekeeping regulation, 45 CFR part 1635.

Paragraph (c) provides an exception for a transfer of LSC funds to bar associations, pro bono programs, private attorneys or law firms, or other entities for the sole purpose of funding private attorney involvement activities (PAI) pursuant to 45 CFR part 1614. For such transfers, the restrictions or requirements would apply only to the LSC funds transferred and not to the other funds of the persons or entities listed in this paragraph.

The December 1996 final rule included provisions on the transfer of non-LSC funds. The interim rule deleted these provisions and included in the rule instead a new §1610.8 on program integrity. The deleted provisions provided that non-LSC funds transferred by a recipient would be subject to the restrictions of this part, but that any other funds of the entity receiving such funds would not be subject to the restrictions.

Comments on the interim rule generally favored deleting the provisions, but suggested that the Corporation state affirmatively in the rule itself that non-LSC funds that are transferred are not subject to the restrictions. The Board determined that it is not necessary to include an affirmative

statement of the effect of taking out the provisions. There is no statutory provision requiring that a transfer of non-LSC funds be subject to LSC restrictions, and the fact that the provision has been deleted speaks for itself.

Section 1610.8 Program integrity of recipient

This section provides a standard for program integrity by requiring that recipients maintain objective integrity and independence from any organization that engages in restricted activities. The program integrity test in the interim rule was a 2-step process. Paragraph (a)(2) of §1610.8 of the interim rule set out the first step by delineating the factors used to determine whether an affiliation existed between the recipient and another organization, such that the recipient would be found to control, be controlled by or be subject to common control by the other organization. The factors to determine control were taken almost verbatim from the Corporation's interrelated organization policy. If such an affiliation were found to exist under paragraph (a), then the recipient was required to comply with step 2, the program integrity test delineated in paragraph (b), so that the restrictions listed in this part would not apply to the affiliate organization. The second step of the program integrity test was fashioned after the program integrity standard found to be constitutional in Rust v. Sullivan by the Supreme Court, see 500 U.S. 173 (1991).

Most of the comments on the interim rule's first step (the interrelated organization policy) stated that the meaning of several of the factors to determine control was unclear. In addition, although paragraph (a) expressly stated that only

one factor would be dispositive of control, the commenters also expressed confusion on this matter and suggested that the determination of control should be based on the totality of the facts and not on the existence of any particular factor.

Based on the Corporation's review of the comments and its research and analysis of the factors of the interrelated organization policy, the Board decided to delete paragraph (a) in its entirety for the following reasons:

The purpose of the policy was to establish whether a relationship existed between the recipient and another organization, such that the recipient and the other organization actually operated as one, rather than two separate organizations. The Board determined that if a program is found to be in compliance with the second step of the program integrity test, there would be a sufficiently separate identity and operational independence from the recipient.

Based on comments from the Corporation's Office of Inspector General (OIG), the Board determined that the interim rule did not provide sufficient guidance regarding any relationship a recipient might have with another independent organization. Under the interim rule, a recipient could have a relationship with another organization in which no formal control of one organization by the other exists, but in which there is substantial sharing of non-LSC funds, office space, equipment and personnel. By deleting paragraph (a) and revising paragraph (b), the rule provides guidance regarding a recipient's relationship with any organization, independent or affiliated, that engages in restricted activities.

At the same time, because the standards will allow control at the Board level, recipients will have an avenue through which to engage in restricted activities as long as they comply with the program integrity standards.

Comments on the second step generally stated that the standards created substantial practical problems for recipients. They also said that the standards were unclear as to the strictness of each factor, whether any particular factor would be determinative and whether a determination of compliance with the standards would be based on the totality of the facts.

Having deleted the first step of the analysis on program integrity, the Board revised the second step to stand alone without reference to the interrelated organization factors. In response to comments, this new paragraph (a) was further revised to clarify that a determination of compliance with the program integrity standard would require a case-by-case determination based on the totality of the facts. Paragraph (a) now provides that a recipient must have an objective integrity and independence from any organization that engages in prohibited activities. Whether a recipient will be found to have such objective integrity and independence will be based on three considerations.

First, paragraph (a)(1) provides that the other organization must be a separate legal entity. This factor was implied but not made explicit in the interim rule. This change is necessary to implement Congressional intent that a recipient as a legal entity may not engage in certain restricted activities, regardless of the source of funds. At the same time,

the Corporation has fashioned a rule that does not foreclose a recipient from engaging in restricted activities through another legally distinct organization, as long as the recipient meets this rule's program integrity standards.

Second, paragraph (a)(2) provides that the other organization must not receive any LSC funds and no LSC funds may subsidize restricted activities. In response to comments, the Board deleted the words "directly or indirectly" before "subsidize" because they elicited objections and provided unclear guidance. "Subsidize" includes a payment of LSC funds to support, in whole or in part, a restricted activity conducted by another entity, or payment to another entity to cover overhead, in whole or in part, relating to a restricted activity. A recipient will be considered to be subsidizing the restricted activities of another organization if it provides the use of its LSC-funded resources to the organization without receiving a fair market price for such use. Thus, if a recipient makes an in-kind contribution, such as donated LSC-funded space or telephone services, to another organization, the donation would be a subsidy. However, this example is not intended to mean that a recipient may share resources as long as the recipient receives a fair payment. A recipient must also maintain an actual physical and financial separation as set out in paragraph (a)(3) of this section.

Third, under paragraph (a)(3), the recipient must maintain a physical and financial separation from the other organization. Mere bookkeeping is not enough and a determination of sufficient separation will be based on the totality of the facts. The factors include, but are not limited

to, existence of separate personnel, existence of separate accounting and timekeeping records, degree of separation of facilities and extent of the use of facilities for restricted work, and the extent to which indicia, such as signs, distinguish the recipient from the other organization. Whether the recipient meets the program integrity standard by having sufficient separation will be determined on a case-by-case basis, and each case will be determined on the totality of the facts and no one factor is intended to be determinative.(1)

Several commenters asked the Corporation to clarify whether the "program integrity" requirement would automatically fail to be satisfied if a particular factor, such as personnel or facilities, was not completely separate. Because the Corporation is adopting a case-by-case approach based on the totality of the circumstances, LSC does not believe that it would be appropriate or feasible to use this preamble to provide advisory opinions based on limited or incomplete information about a recipient's relationship with an organization involved in restricted activities. However, consistent with the Corporation's longstanding practice regarding compliance issues, individual recipients are welcome to submit all the relevant "program integrity" information and request a review by the Corporation of any existing or contemplated relationship with an organization that engages in restricted activities.

Commenters on the practical problems raised by the standards argued for mere bookkeeping and appeared to say that use of LSC-funded facilities and equipment is necessary for a non-LSC organization to function and engage in

prohibited activities. Some commenters stated that it is not financially possible to duplicate everything and that programs should be allowed to use a recipient's facilities, equipment or staff, as long as there is appropriate documentation and allocation of funds. The Board determined that such a situation would violate the Congressional requirement that entities it funds not engage in restricted activities. The rule requires "objective integrity and independence" which cannot be achieved by mere bookkeeping. Thus, determinations taking into account the physical and financial separation standards must ensure that there is no identification of the recipient with restricted activities and that the other organization is not so closely identified with the recipient that there might be confusion or misunderstanding about the recipient's involvement with or endorsement of prohibited activities.

The interim rule's requirement that the recipient's board approve the recipient's affiliation with another organization has been deleted and replaced by a requirement in paragraph (b) that each recipient's governing body certify to the Corporation within 180 days of the effective date of this rule that it is in compliance with the program integrity standards set out in this section. Thereafter, the governing body must certify on an annual basis that the recipient has maintained such compliance. This requirement is intended to ensure that a recipient's governing body has reviewed any relationships the recipient has with other organizations involved in restricted activities to assure compliance with the program integrity standards. The Corporation will issue guidance regarding the form of certification and the records necessary to support such certification.

Appendix E

Section 1610.9 Accounting

This section sets out the general accounting requirement for recipients for their non-LSC funds. Currently, recipients are directed by the accounting guidance issued by the Corporation.

List of Subjects in 45 CFR Part 1610

Grant Programs, Legal services.

For reasons set forth in the preamble, LSC revises 45 CFR Part 1610 to read as follows:

PART 1610 — USE OF NON-LSC FUNDS, TRANSFERS OF LSC FUNDS, PROGRAM INTEGRITY

Sec.

1610.1 Purpose.
1610.2 Definitions.
1610.3 Prohibition.
1610.4 Authorized use of non-LSC funds.
1610.5 Notification.
1610.6 Applicability.
1610.7 Transfers of LSC funds.
1610.8 Program integrity of recipient.
1610.9 Accounting.

Authority: 42 U.S.C. 2996i; Pub. L. 104-208, 110 Stat. 3009; Pub. L. 104-134, 110 Stat. 1321.

§ 1610.1 Purpose.

This part is designed to implement statutory restrictions on the use of non- LSC funds by LSC recipients and to ensure

that no LSC-funded entity shall engage in any restricted activities and that recipients maintain objective integrity and independence from organizations that engage in restricted activities.

§ 1610.2 Definitions.

(a) Purpose prohibited by the LSC Act means any activity prohibited by the following sections of the LSC Act and those provisions of the Corporation's regulations that implement such sections of the Act:

(1) Sections 1006(d)(3), 1006(d)(4), 1007(a)(6), and 1007(b)(4) of the LSC Act and 45 CFR part 1608 of the LSC Regulations (Political activities);

(2) Section 1007(a)(10) of the LSC Act (Activities inconsistent with professional responsibilities);

(3) Section 1007(b)(1) of the LSC Act and 45 CFR part 1609 of the LSC regulations (Fee-generating cases);

(4) Section 1007(b)(2) of the LSC Act and 45 CFR part 1613 of the LSC Regulations (Criminal proceedings);

(5) Section 1007(b)(3) of the LSC Act and 45 CFR part 1615 of the LSC Regulations (Actions challenging criminal convictions);

(6) Section 1007(b)(7) of the LSC Act and 45 CFR part 1612 of the LSC Regulations (Organizing activities);

(7) Section 1007(b)(8) of the LSC Act (Abortions);

(8) Section 1007(b)(9) of the LSC Act (School desegregation); and

(9) Section 1007(b)(10) of the LSC Act (Violations of Military Selective Service Act or military desertion).

(b) Activity prohibited by or inconsistent with Section 504 means any activity prohibited by, or inconsistent with the requirements of, the following sections of 110 Stat. 1321 (1996) and those provisions of the Corporation's regulations that implement those sections:

(1) Section 504(a)(1) and 45 CFR part 1632 of the LSC Regulations (Redistricting);

(2) Sections 504(a)(2) through (6), as modified by Sections 504(b) and (e), and 45 CFR part 1612 of the LSC Regulations (Legislative and administrative advocacy);

(3) Section 504(a)(7) and 45 CFR part 1617 of the LSC Regulations (Class actions);

(4) Section 504(a)(8) and 45 CFR part 1636 of the LSC Regulations (Client identification and statement of facts);

(5) Section 504(a)(9) and 45 CFR part 1620 of the LSC Regulations (Priorities);

(6) Section 504(a)(10) and 45 CFR part 1635 of the LSC Regulations (Timekeeping);

(7) Section 504(a)(11) and 45 CFR part 1626 of the LSC Regulations (Aliens);

(8) Section 504(a)(12) and 45 CFR part 1612 of the LSC Regulations (Public policy training);

(9) Section 504(a)(13) and 45 CFR part 1642 of the LSC Regulations (Attorneys' fees);

(10) Section 504(a)(14) (Abortion litigation);

(11) Section 504(a)(15) and 45 CFR part 1637 of the LSC Regulations (Prisoner litigation);

(12) Section 504(a)(16), as modified by Section 504(e), and 45 CFR part 1639 of the LSC Regulations (Welfare reform);

(13) Section 504(a)(17) and 45 CFR part 1633 of the LSC Regulations (Drug-related evictions); and

(14) Section 504(a)(18) and 45 CFR part 1638 of the LSC Regulations (In- person solicitation).

(c) IOLTA funds means funds derived from programs established by State court rules or legislation that collect and distribute interest on lawyers' trust accounts.

(d) Non-LSC funds means funds derived from a source other than the Corporation.

(e) Private funds means funds derived from an individual or entity other than a governmental source or LSC.

(f) Public funds means non-LSC funds derived from a Federal, State, or local government or instrumentality of a government. For purposes of this part, IOLTA funds shall be treated in the same manner as public funds.

(g) Transfer means a payment of LSC funds by a recipient to a person or entity for the purpose of conducting programmatic activities that are normally conducted by the recipient, such as the representation of eligible clients, or that provide direct support to the recipient's legal assistance activities. Transfer does not include any payment of LSC funds to vendors, accountants or other providers of goods and services made by the recipient in the normal course of business.

(h) Tribal funds means funds received from an Indian tribe or from a private nonprofit foundation or organization for the benefit of Indians or Indian tribes.

§ 1610.3 Prohibition.

A recipient may not use non-LSC funds for any purpose prohibited by the LSC Act or for any activity prohibited by or inconsistent with Section 504, unless such use is authorized by §§ 1610.4, 1610.6 or 1610.7 of this part.

Appendix E

§ 1610.4 Authorized use of non-LSC funds.

(a) A recipient may receive tribal funds and expend them in accordance with the specific purposes for which the tribal funds were provided.

(b) A recipient may receive public or IOLTA funds and use them in accordance with the specific purposes for which they were provided, if the funds are not used for any activity prohibited by or inconsistent with Section 504.

(c) A recipient may receive private funds and use them in accordance with the purposes for which they were provided, provided that the funds are not used for any activity prohibited by the LSC Act or prohibited or inconsistent with Section 504.

(d) A recipient may use non-LSC funds to provide legal assistance to an individual who is not financially eligible for services under part 1611 of this chapter, provided that the funds are used for the specific purposes for which those funds were provided and are not used for any activity prohibited by the LSC Act or prohibited by or inconsistent with Section 504.

§ 1610.5 Notification.

(a) Except as provided in paragraph (b) of this section, no recipient may accept funds from any source other than the Corporation, unless the recipient provides to the source of the funds written notification of the prohibitions and conditions which apply to the funds.

(b) A recipient is not required to provide such notification for receipt of contributions of less than $250.

§ 1610.6 Applicability.

Notwithstanding § 1610.7(a), the prohibitions referred to in §§ 1610.2(a)(4) (Criminal proceedings), (a)(5) (Actions challenging criminal convictions), (b)(7) (Aliens) or (b)(11) (Prisoner litigation) of this part will not apply to:

(a) A recipient's or subrecipient's separately funded public defender program or project; or

(b) Criminal or related cases accepted by a recipient or subrecipient pursuant to a court appointment.

§ 1610.7 Transfers of LSC funds.

(a) If a recipient transfers LSC funds to another person or entity, the prohibitions and requirements referred to in this part, except as modified by paragraphs (b) and (c) of this section, will apply both to the LSC funds transferred and to the non-LSC funds of the person or entity to whom those funds are transferred.

(b)(1) In regard to the requirement in § 1610.2(b)(5) on priorities, persons or entities receiving a transfer of LSC funds shall either:

(i) Use the funds transferred consistent with the recipient's priorities; or

(ii) Establish their own priorities for the use of the funds transferred consistent with 45 CFR part 1620;

(2) In regard to the requirement in § 1610.2(b)(6) on timekeeping, persons or entities receiving a transfer of LSC funds are required to maintain records of time spent on each case or matter undertaken with the funds transferred.

(c) For a transfer of LSC funds to bar associations, pro bono programs, private attorneys or law firms, or other entities for the sole purpose of funding private attorney involvement activities (PAI) pursuant to 45 CFR part 1614, the prohibitions or requirements of this part shall apply only to the funds transferred.

§ 1610.8 Program integrity of recipient.

(a) A recipient must have objective integrity and independence from any organization that engages in restricted activities. A recipient will be found to have objective integrity and independence from such an organization if:

(1) The other organization is a legally separate entity;

(2) The other organization receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities; and

(3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient. Whether sufficient physical and financial separation exists will be determined on a case-by-case basis and will be based on the totality of the facts. The presence or absence of any one or more factors will not be determinative. Factors relevant to this determination shall include but will not be limited to:

(i) The existence of separate personnel;

(ii) The existence of separate accounting and timekeeping records;

(iii) The degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and

(iv) The extent to which signs and other forms of identification which distinguish the recipient from the organization are present.

(b) Each recipient's governing body must certify to the Corporation within 180 days of the effective date of this part that the recipient is in compliance with the requirements of this section. Thereafter, the recipient's governing body must certify such compliance to the Corporation on an annual basis.

Appendix E

§ 1610.9 Accounting.

Funds received by a recipient from a source other than the Corporation shall be accounted for as separate and distinct receipts and disbursements in a manner directed by the Corporation.

* * * *

(2)

No. 99-604

Supreme Court, U.S.
FILED
NOV 11 1999
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CARMEN VELAZQUEZ, *et al.*,

Petitioners,

—v.—

LEGAL SERVICES CORPORATION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF LEGAL SERVICES CORPORATION IN OPPOSITION

ALAN LEVINE
Counsel of Record
STEPHEN A. WIEDER
STEPHEN L. ASCHER
KRONISH LIEB WEINER
& HELLMAN LLP
1114 Avenue of the Americas
New York, New York 10036
(212) 479-6000

Counsel for Respondent
Legal Services Corporation

Dated: November 6, 1999

25 P

QUESTION PRESENTED

Whether the court of appeals correctly held that the restrictions imposed on the activities of Legal Service Corporation grantees contained in the 1996 and 1997 Omnibus Appropriations Acts and the Department of Commerce, Justice and State, The Judiciary and Related Agencies Appropriations Act, 1998 (with the exception of one such restriction), and the regulations implementing those restrictions, 45 C.F.R. Part 1610, did not violate the First Amendment of the United States Constitution.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. The History And Purpose Of The LSC Program	1
B. The 1996 Compromise Concerning LSC	4
C. The Restrictions At Issue	5
D. LSC's Program-Integrity Regulations	6
E. The District Court Litigation	7
F. The Court of Appeals' Decision	8
REASONS FOR DENYING THE WRIT	10
A. The Court of Appeals Correctly Rejected The Argument That The LSC Program Creates A Traditional Lawyer-Client Relationship	10
B. The Restrictions In The 1996 Act Do Not Constitute Viewpoint Discrimination	13
C. The Court of Appeals Correctly Rejected The Argument That The Program Integrity Rules Impermissibly Burden The Exercise Of Constitutional Rights	16

PAGE

D. The Court of Appeals Correctly Held That LSC's Regulations Are Entitled To Chevron Deference 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases PAGE

Chevron USA Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 10, 18

FCC v. League of Women Voters, 468 U.S. 364 (1984) 1, 7, 9, 10, 16

Harris v. McRae, 448 U.S. 297 (1980) 15, 17

Legal Aid Society of Hawaii v. Legal Services Corporation, 145 F.3d 1017 (9th Cir.), *cert. denied*, 119 S. Ct. 539 (1998) ..... *passim*

Legal Aid Society of Hawaii v. Legal Services Corporation, 961 F. Supp. 1402 (D. Haw. 1997). 7

Legal Aid Society of Hawaii v. Legal Services Corporation, 981 F. Supp. 1288 (D. Haw. 1997). 8

NAACP v. Button, 371 U.S. 415 (1963) 10

National Endowment for the Arts v. Finley, 118 S. Ct. 2168 (1998) 10, 13, 15

In re Primus, 436 U.S.1996 10

Regan v. Taxation Without Representation, 461 U.S. 540 (1983), ... *passim*

Regional Management Corp. v. Legal Services Corp., 186 F.3d 457, 1999 WL 547925 (4th Cir., July 28, 1999) 18

Rosenberger v. Rector and Visitors the University of Virginia, 515 U.S. 819 (1995) 10, 12, 13

Rust v. Sullivan, 500 U.S. 173 (1990) ..... *passim*

Smith v. Ehrlich, 430 F. Supp. 818 (D.D.C. 1976) 3

PAGE

Spokane County Legal Services v. Legal Services Corp., 614 F.2d 662 (9th Cir. 1980) 18

Texas Rural Legal Aid v. Legal Services Corp., 940 F.2d 685 (D.C. Cir. 1991) 3, 10, 18

Turner Broadcasting Co. v. Federal Communications Commission, 512 U.S. 622 (1994) 17

United Mine Workers of America v. Illinois State Bar, 389 U.S. 217 (1967) 10

Statutes, Regulations And Legislative History

42 U.S.C. § 2996 *et seq*.....*passim*

42 C.F.R. § 59.8 (1989) 14

45 C.F.R. § 1610 (1976)..... 3, 8

45 C.F.R. § 1612 (1998)..... 5

45 C.F.R. § 1617 (1996)..... 5

45 C.F.R. § 1627 (1995)..... 3

45 C.F.R. § 1642 (1997)..... 5

61 Fed. Reg. 63749 (Dec. 2, 1996) 5

61 Fed. Reg. 64636 (Nov. 23, 1998)..... 18

119 Cong. Rec. 20688 (1973)..... 2

141 Cong. Rec. S14590 (Sept. 29, 1995) 4

141 Cong. Rec. S14592 (Sept. 29, 1995) 4

141 Cong. Rec. S14605 (Sept. 29, 1995) 4

141 Cong. Rec. S14607 (Sep. 29, 1995)..... 5

141 Cong. Rec. S14612 (Sep. 29, 1995)..... 5

PAGE

141 Cong. Rec. S18160 (Dec. 7, 1995) 2

142 Cong. Rec. H8178 (July 23, 1996) 2

142 Cong. Rec. H8180 (July 23, 1996) 2

142 Cong. Rec. H8189 (July 23, 1996) 2

142 Cong. Rec. S1963 (Mar. 13, 1996) 5

H.R. Rep. No. 95-310 (1977) 2, 3

S. Rep. No. 95-172 (1977) 2, 3

STATEMENT OF THE CASE

Contrary to Petitioners' characterization, there is nothing novel or confusing about the state of the law governing this case. On January 7, 1999, the United States Court of Appeals for the Second Circuit unanimously upheld all but one provision of the 1996 legislation imposing certain restrictions on the activities of Legal Services Corporation grantees against a facial constitutional challenge. In doing so, the court of appeals applied this Court's well established teachings in *Regan v. Taxation Without Representation*, 461 U.S. 540 (1983) (*"TWR"*), *FCC v. League of Women Voters*, 468 U.S. 364 (1984), and *Rust v. Sullivan*, 500 U.S. 173 (1990). The court's ruling was also consistent with that of the Ninth Circuit, which in a unanimous opinion written by former Justice Byron White, also rejected a constitutional challenge to the LSC statute. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 145 F.3d 1017 (9th Cir.), *cert. denied*, 119 S. Ct. 539 (1998) ("*LASH III*").

In short, as we demonstrate more fully below, there is no conflict with either prior rulings of this Court or with decisions of other circuit courts with respect to the issues raised in this petition, and the petition should therefore be denied. In order to more fully understand why this is the case, the following background concerning the history of the Legal Services Program and this litigation is necessary.

A. The History And Purpose Of The LSC Program

Congress created the Legal Services Corporation ("LSC") in 1974 as an independent, non-profit corporation whose purpose was to provide basic legal services to the poor. Pub. L. No. 93-355, 88 Stat. 378 (1974) (codified as amended, 42 U.S.C. §§ 2996 et seq. (1994)) (the "LSC Act"). The history of the program makes certain things abundantly clear.

First, Congress intended that the program it created would operate as a subsidy program that would use both federal

money and funds from other sources to carry out its mission. Every year, LSC distributes funds appropriated by Congress to local grantee organizations. 42 U.S.C. §§ 2996b(a) and 2996e(a). However, virtually all LSC grantee programs are funded with a combination of LSC and non-LSC funds from public and/or private sources. JA 297 (¶ 4); JA 225 (¶ 14).[1]

Second, Congress viewed a primary purpose of the program as providing "traditional legal representation for the poor." H.R. Rep. No. 95-310 at 34 (1977) (views of Rep. McClory). As one Member of the House stated, lawyers in programs funded by LSC should be "preoccupied with day-to-day problems involving housing, domestic relations, consumer affairs and employment" and should not be "spending their time reforming laws they find discriminatory against the poor through class action and test-case litigation." 119 Cong. Rec. 20688 (1973) (Rep. Biester).[2] Thus, Congress intended the program to emphasize individual cases in areas such as consumer and family law, and housing.[3] The primary focus continues to be on "bread-and-butter services." 142 Cong. Rec. H8189 (July 23, 1996) (Rep. Torkildsen).

---

[1] Citations to "JA" are to the Joint Appendix submitted in connection with the appeal below

[2] See also 142 Cong. Rec. H8178 (July 23, 1996) ("the purposes which we all endorsed [were] to meet the day-to-day legal problems of the poor") (Rep. Fox); H8180 ("[T]hey are supposed to be doing the ham and eggs work for poor people.") (Rep. Hunter).

[3] *See* S. Rep. No. 95-172 at 3 (1977) ("Most of the legal problems of eligible clients fall into four broad categories: family law; administrative benefits, including Medicaid, AFDC, and SSI; consumer law; and housing law.") This focus on the daily needs of the individual poor continued in the debates concerning the restrictions that were added in the 1996 and 1997 Acts. *See, e.g.*, 141 Cong. Rec. S18160 (Dec. 7, 1995) (emphasizing "such routine legal matters as consumer problems, housing issues, domestic and family cases, and . . . public benefits") (Sen. Sarbanes).

Third, to maintain this focus, Congress took a variety of steps to further its mandate that "[t]he legal services program must be kept free from the influence of or use by it of political pressures." 42 U.S.C. § 2996(5). For example, the LSC Act barred political activity by LSC or its grantees. 42 U.S.C. §§ 2996e(d)(3) (prohibiting campaign contributions by LSC grantees); 2996e(d)(4) (prohibiting activities "advocating or opposing any ballot measures, initiatives, or referendums"); and 2996f(5) (restrictions on lobbying). Other provisions were designed to keep LSC clear of politically controversial topics. For example, the statute barred LSC grantees from participating in litigation concerning school desegregation, abortion, and "draft dodgers." Id. §§ 2996f(b)(8)-(10). It also prohibited most criminal representation and strictly limited civil representation of prisoners, class actions, and fee-generating cases. Id. §§ 2996e(d)(5) and 2996f(b)(1)-(4). Most of these restrictions applied even if the activities were funded by private donors. Id. § 2996i(c) See also JA 297-298 (¶¶ 3-8).[4]

Congress believed that these restrictions on the activities LSC lawyers could engage in were necessary to achieve its goal of keeping LSC apolitical: "[P]art of the reason for [LSC's] success in avoiding the 'political thicket' and controversy has been some of the restrictions we placed in the original act of 1974." H.R. Rep. No. 95-310 at 31 (1977) (Rep. Butler). *See also Smith v. Ehrlich*, 430 F. Supp. 818 (D.D.C. 1976) (upholding prohibition on LSC lawyers running for political office). Additional restrictions promulgated by LSC were upheld as implementing the statutory mandate to avoid politically controversial issues. *Texas Rural Legal Aid v. Legal Services Corp.*, 940 F.2d 685 (D.C. Cir. 1991) (regulation barring redistricting activities). The history of

---

[4] See also S. Rep. No. 95-172 at 7 (1977) ("[§ 2996i(c)] imposes the same prohibitions on funds received from private sources as those that are imposed on funds received from [LSC]"); 45 C.F.R. Parts 1610, 1627 (1995); 45 C.F.R. § 1610.1 (1976).

restrictions on the activities of LSC grantees is thus as old as the program itself.

B. The 1996 Compromise Concerning LSC

Over time, LSC came under attack from various quarters. App. 57a-58a.[5] The pressures increased in 1995 and 1996, as a result of budget constraints and the perception by some members of Congress that LSC was under the influence of "liberal activists who favor a militant agenda." 141 Cong. Rec. S14592 (Sept. 29, 1995). Some critics of LSC attempted to eliminate it entirely. Those efforts were rejected in favor of compromise legislation supported by Representative Rogers and Senator Domenici that was incorporated in the 1996 Omnibus Appropriations Act, Pub. L. No. 104-34, 110 Stat. 1321 (the "1996 Act").[6] That compromise reduced LSC's appropriation, provided for additional subject matter restrictions, and extended the restrictions to cover all funds of LSC grantees. Congress made clear that the purpose of the restrictions was to refocus LSC on its original mission and "to ensure that funding is used to provide the traditional legal services that are most needed by poor people." 141 Cong. Rec. S14605 (Sept. 29, 1995) (Sen. Stevens). See also S14590 ("[T]hese restrictions provide the necessary guidance to take Legal Services back to its primary mission." (Sen. Kassebaum)).

The Congressional debates make clear that the restrictions in the 1996 Act were an effort to save LSC and preserve its original focus and mission, not to eliminate the program. As Senator Domenici, one of the principal architects of the legislation, stated: "While some may not like these restrictions,

---

[5] References to "App." are to the Appendix to Petitioners' petition.

[6] The restrictions at issue here were continued in subsequent legislation in 1997 (Pub. L. 104-208, 110 Stat. 3009) and 1998 (Pub. L. 105-119, 111 Stat. 2440). (the "1997 and 1998 Acts"). Accordingly, for ease of reference, we will hereinafter only refer to the 1996 Act. *See* App. 107a-145a.

they are necessary to . . . protect LSC from the negative perceptions of those who wish to see its termination." 142 Cong. Rec. S1963 (Mar. 13, 1996).[7]

C. The Restrictions At Issue

The restrictions in the 1996 Act that Petitioners sought to enjoin can be divided into three groups:

First, LSC may not provide funds to entities that litigate on behalf of certain aliens and incarcerated persons, or to entities that solicit clients in person to represent them for any purpose. 1996 Act §§ 504(a)(11), (15) and (18) ("representation restrictions").

Second, LSC may not provide funds to entities engaged in class action litigation or cases in which attorneys' fees are sought. Id. §§ 504(a)(7) and (13); 45 C.F.R. Parts 1617 and 1642 ("procedural restrictions").

Third, LSC cannot fund entities involved in efforts to influence executive orders and regulations, agency policies of general applicability and future effect, legislation, constitutional amendments, referenda, or initiatives. Id. §§ 504(a)(2)-(4) ("advocacy restrictions"). Grantee attorneys may, however, use non-LSC funds to participate in public rulemaking of any sort (including reform of a welfare system), to respond to written requests for information from agencies or legislative bodies, or to lobby for funding of the grantee organization itself. 45 C.F.R. 1612.6(a), (e) and (f).

The 1996 Act also provides that these restrictions apply to all of an LSC grantee's funds, and to any entity receiving a transfer of LSC funds. 1996 Act § 504(d); 61 Fed. Reg.

---

[7] See also 141 Cong. Rec. S14607 (Sep. 29, 1995) ("[M]any of these restrictions are necessary to ensure that the program as a whole is supported and funded") (Sen. Lautenberg); S14612 ("[S]ome restrictions are necessary to ensure support for the program . . . . The [compromise] . . . would correct the harsh injustice of the committee bill and enable [LSC] to continue its important work") (Sen. Kennedy).

63749-54 (Dec. 2, 1996). Previously, the restrictions applied to a grantee's LSC funds, and in some cases, private funds as well, but not to a grantee's public funds.

Under the rules, if an attorney in an LSC-funded program determines that a strategy that they may not pursue is in the client's best interest, they can refer the client to an organization not covered by the limitations. App. 80a-81a and 102a. Individual full time employees are free to engage in the restricted "advocacy" activities in their individual capacity and on their own time. Finally, the regulations do not prohibit part-time employees of LSC grantees—including lawyers—from participating in the restricted activities as employees of non-LSC funded organizations that are financially and physically separate from the grantee. JA 294-295.

D. LSC's Program-Integrity Regulations

Shortly after the passage of the 1996 Act, LSC began drafting implementing rules and solicited comments on several interim rules. At that time, LSC's policy did not allow any entity under the effective control of an LSC grantee to engage in prohibited activities. Whether an entity was "effectively controlled" by a grantee was determined based on an "interrelated organizations" test which considered the presence of interlocking directors, shared funding, and other similar factors. JA 324 (¶¶ 14-15) and 360-362.

LSC grantees were required to disengage themselves from most pending restricted matters and to close or otherwise transfer pending class actions and matters involving prisoners and aliens by August 1, 1996. Between enactment of the 1996 Act and August 1, 1996, many cases were settled or otherwise terminated. Where cases were not terminated, recipients were required to either locate and arrange for the referral of the matter to another appropriate service provider, or to transfer the case to substitute counsel. Recipients were obligated to close or transfer open matters consistent with

their professional responsibilities to their clients. JA 320-321 (¶¶ 3-5).

E. The District Court Litigation

On January 27, 1997, Petitioners moved to preliminarily enjoin the restrictions described above on the grounds that, inter alia, they violated the First Amendment. Several weeks earlier, a similar action had been brought in the United States District Court for the District of Hawaii. Before briefing in the instant action was completed, that court granted in part and denied in part the request for a preliminary injunction in the action before it. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 961 F. Supp. 1402 (D. Haw. 1997) ("*LASH I*"). The court found that the plaintiffs had a fair likelihood of showing that LSC regulations then in effect, as they related to most of the restricted activities, violated the unconstitutional conditions doctrine because LSC's "interrelated organizations" rule failed to provide the adequate alternative channels of expression required by this Court in its decisions in *TWR*, *League of Women Voters* and *Rust*. The court also concluded that restrictions on class actions, claims for attorneys' fees, and representation of ineligible aliens did not implicate any constitutional rights, and denied the motion as to those restrictions. *LASH I*, 961 F. Supp. at 1410-1411.

In response, LSC reviewed and modified its implementing rules to address the concerns raised in *LASH I*. Interim rules were published in the Federal Register on March 14, 1997. These rules, which were in effect when the district court heard argument on Petitioners' motion, eliminated the regulations restricting transfers of non-LSC funds and created an alternative avenue for expression through "interrelated organizations" that were "physically and financially" separate from LSC recipients. JA 322-324 and 356-359. The physical and financial separation requirements were modeled after the regulations upheld in *Rust*. JA 495 and 507. However, as the district court observed, there were still differences between the LSC regulations and those at issue in *Rust*. App. 74a-75a.

After receiving comments on the new interim rule, on May 21, 1997 LSC revised and issued the "program integrity" regulations at issue here. 45 C.F.R. Part 1610. (App. 146a-172a). These regulations completely eliminated the "interrelated organizations" test and removed minor variations in wording between the LSC (interim) rule and the regulations approved by this Court in *Rust*.

On December 22, 1997, the district court denied the motion for a preliminary injunction. App. 53a-103a. It concluded that the regulations constituted a permissible attempt by LSC to guard against the appearance that Congress was supporting the prohibited activities, and rejected Petitioners' contention that they were void-for-vagueness or overbroad. Relying on *Rust*, the court also found that the restrictions did not significantly impinge upon any First Amendment rights. It also rejected Petitioners' claim that doctors and lawyers in federally subsidized programs are somehow different.

In concluding that the program integrity regulations were constitutional under *Rust*, the district court reached the same conclusion as the federal court in Hawaii, which, after considering the impact of the final rules on its initial ruling, dissolved its earlier injunction and granted LSC summary judgment. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 981 F. Supp. 1288 (D. Haw. 1997) ("*LASH II*"). That decision was affirmed by the Court of Appeals for the Ninth Circuit in *LASH III*.

F. The Court of Appeals' Decision

On appeal, the court of appeals unanimously affirmed the lower court's ruling in all but one respect.[8] Relying on this

[8] By a two-to-one vote, the panel held that a provision in section 504(a)(16) of the 1996 Act prohibiting an LSC-funded lawyer from representing a client if the representation involves a challenge to the welfare reform law as it exists at the time the representation is undertaken was

(continued)

Court's decisions in *TWR*, *League of Women Voters*, and *Rust*, the court held that the 1996 Act did not impermissibly condition the receipt of a government benefit on the relinquishment of First Amendment rights because LSC's program-integrity rules provided adequate alternative channels for the exercise of those rights. The court also rejected the claim that the relationship between LSC-funded lawyers and their clients was entitled to more protection than the doctor-patient relationship in *Rust*:

> [T]he lawyer-client relationships funded by LSC are no more "all-encompassing" than the doctor-patient relationships funded under Title X, which were considered in *Rust*. . . . .
>
> * * * *
>
> Just as Congress is entitled to provide a limited range of medical services under Title X, it is free to offer a limited menu of legal services under the LSCA.

App. 17a.

Petitioners had also argued that the requirements of the program integrity regulations were "immensely wasteful" and so substantial so as to interfere with the (alleged) First Amendment rights at issue. The court rejected this argument, noting that there was no evidence in the record that the restrictions—which, the court observed, were identical to those at issue in *Rust*—had the impact alleged by Petitioners, and that Petitioners had failed to establish, as they were required to do in mounting a facial challenge to the statute, "that no set of circumstances exists under which the Act would be valid." App. 22a-24a.

Finally, the court rejected Petitioners' argument that the program integrity regulations were an unreasonable inter-

---

(continued)

unconstitutional. That aspect of the panel's decision is the subject of LSC's petition for a writ of certiorari (Docket No. 99-603) and is not addressed here.

pretation of the 1996 Act and not entitled to full deference under this Court's ruling in *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Following the only case that had previously addressed the issue (*Texas Rural Legal Aid v. Legal Services Corp.*, 940 F.2d 865 (D.C. Cir. 1991)), the court held that LSC's regulations were entitled to full *Chevron* deference and that applying this standard, the regulations were a "permissible construction" of the LSC Act. App. 10a-13a.

REASONS FOR DENYING THE WRIT

That part of the unanimous decision of the court of appeals upholding the 1996 Act against the facial First Amendment challenge is correct. It is consistent with this Court's rulings in *Rust*, *TWR*, *League of Women Voters*, *Rosenberger v. Rector and Visitors the University of Virginia*, 515 U.S. 819 (1995) and *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998). It is also is in accord with the Ninth Circuit's decision in *Lash III*. Petitioners seek to create a sense that this case is complicated and unique by misconstruing dictum in *Rust* and by attempting to shoehorn a federally funded program to provide a narrowly defined set of legal services to the indigent into this Court's public forum jurisprudence. As we demonstrate below, every federal court that has considered these arguments has rejected them. There is no reason for this Court to grant the petition.

A. The Court of Appeals Correctly Rejected The Argument That The LSC Program Creates A Traditional Lawyer-Client Relationship

Relying on cases involving the associational rights of privately established lawyer-client relationships,[9] Petitioners

[9] Petitioners rely, *inter alia*, on *NAACP v. Button*, 371 U.S. 415 (1963), *In re Primus*, 436 U.S.1996, and *United Mine Workers of Amer-*

(continued)

argue that the associational rights of LSC-funded lawyers are being impermissibly burdened. This argument is fundamentally flawed because it ignores the basic fact that, as the Second Circuit correctly concluded, a traditional, all-encompassing lawyer-client relationship does not exist here.

As the Second Circuit noted, Petitioners' argument is based on dictum in *Rust* suggesting that "[i]t could be argued . . . that traditional relationships such as between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government." *Rust*, 500 U.S. at 200. Based on this suggestion, Petitioners argue that *Rust* conferred the full scope of First Amendment protection to "traditional" service provider-client relationships, and that such a relationship exists here. However, as the Second Circuit observed, the Court in *Rust* concluded that it *did not* have to address this hypothetical because "the doctor-patient relationship established by the Title X program [was not] sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." *Id.*

The Second Circuit correctly held that, as in *Rust*, the lawyer- client relationship established by the LSC program was also not the "traditional" and "all-encompassing" relationship that *might* qualify for constitutional protection:

> Even if we assume that an "all-encompassing" lawyer-client relationship enjoys heightened protection from government regulation, the lawyer-client relationships funded by LSC are no more "all-encompassing' than the doctor-patient relationships funded under Title X, which were considered in *Rust*. *[T]he LSCA has always limited the range of legal services available*. . . Because grantee lawyers are bound to explain to prospective and actual clients the limitations imposed by the 1996

(continued)

ica v. Illinois State Bar, 389 U.S. 217 (1967), all of which involved private organizations and lawyers working for or affiliated with them.

> restrictions, and may refer clients to lawyers unencumbered by the restrictions, there is no reason to fear that clients will detrimentally rely on their LSC lawyers for a full range of full legal services. The LSC lawyer-client relationship cannot, therefore, be considered "sufficiently all-encompassing so as to justify an expectation on the part of the [client] of comprehensive [legal] advice." *Rust*, 500 U.S. at 200. *Accordingly, we need not decide whether the traditional lawyer-client relationship enjoys constitutional protection because (as in Rust) such a relationship does not exist for practitioners and clients operating under the challenged statutory scheme.*

App. 16a-17a (emphasis added). Thus, as in *Rust*, the question of whether or not a traditional lawyer-client (or doctor-patient) relationship is entitled to First Amendment protection is not before this Court.

Petitioners, relying on *Rosenberger*, also argue that lawyers should be viewed somewhat akin to teachers or other speakers in universities that receive government funding. Once again, Petitioners misconstrue the nature of the LSC program.

In *Rosenberger*, this Court held that when the government spends money to create a public forum dedicated to promoting the free exchange of ideas—like a university newspaper—it may not selectively subsidize points of view. The LSC program is *not* a public forum, and it is dedicated to the provision of a specifically defined set of services to the indigent, *not* to the free exchange of ideas.

The irrelevance of *Rosenberger* and public forum jurisprudence was recognized by Justice White (part of the *Rust* majority), sitting by designation in *LASH III*:

> Appellants rely on *Rosenberger* to support their claim that the LSC is a program designed to encourage private speech . . . This analogy to *Rosenberger* is not persuasive. The government in *Rosenberger* "expend[ed] funds to encourage a diversity of views from private speakers,"

> unlike the LSC program where the "government [has] appropriate[d] public funds to promote a particular policy of its own." Like the Title X program in *Rust*, the LSC program is designed to provide professional services of limited scope to indigent persons, not to create a forum for the free expression of ideas.

LASH III, 145 F.3d at 1028 (citations omitted).

In *Finley*, this Court reconfirmed that the distinguishing feature of *Rosenberger* was the use of government funds to create a limited public forum. *Finley*, 118 S. Ct. at 2178 ("We held [in *Rosenberger*] that . . . the University had created a limited public forum from which it impermissibly excluded all publications with religious editorial viewpoints.) *See also id.*, at 2184 ("*Rosenberger* . . . found the viewpoint discrimination unconstitutional, not because 'private' speech was involved, but because the government had established a limited public forum. . .") (Scalia, J., concurring).

Because the LSC program is not a limited public forum for the free exchange of ideas, *Rosenberger* has no bearing on this case. The restrictions in the LSC Act are constitutional.

B. The Restrictions In The 1996 Act Do Not Constitute Viewpoint Discrimination

Petitioners raise the claim that the restrictions in the 1996 Act constitute impermissible viewpoint based discrimination. This argument was also correctly rejected.

First, as the court of appeals observed, the restrictions at issue focus on subject-matter, not viewpoint. App. 24a-29a. Thus, for example, the 1996 Act restricts LSC grantees from "attempting to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress of a State or local legislative body." 1996 Act at § 504(a)(4). The court correctly concluded that because this restriction applies to attempts to

influence the passage *or* defeat of legislation, it "burdens no particular viewpoint and favors neither speech in support of legislative action nor speech opposed." App. 25a.

Moreover, Petitioners ignore *Rust*. *Rust* involved a challenge to a section of the Public Health Services Act prohibiting the use of funds appropriated for family-planning services in programs where abortion was a method of family planning and the regulations promulgated thereunder. The *Rust* limitations imposed a "gag rule" on doctors. Doctors in the Title X program could thus not talk to their pregnant clients about abortion, either to advise them that abortion was an alternative they could consider or to refer them to doctors who were not part of the Title X program and therefore free to discuss this option with them. 42 C.F.R. §§ 59.8(a)(1)-(2) and (5). The limitations in *Rust* prevented doctors from (a) giving their patients complete advice with respect to their health care options, (b) informing their patients of an option that was a constitutional right, and (c) even disclosing the fact that the rules required the doctors to provide one-sided advice.

The *Rust* gag-rule was challenged as a violation of the free speech clause of the First Amendment. This district court and Second Circuit both rejected this argument. Before this Court, petitioners argued for a third time that the statute and regulations "impermissibly impos[ed] 'viewpoint-discriminatory conditions on government subsidies.' " *Rust*, 500 U.S. at 192 (quoting petitioners' Brief). And for a third time, the argument—the precise one being advanced in this case—was rejected:

> There is no question that the statutory prohibition [on abortion-related activity in the context of the Title X program] is constitutional. . . . The Government can, without violating the Constitution, *selectively fund* a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem

> in another way. *In doing so, the Government has not discriminated on the basis of viewpoint; it has merely chose to fund one activity to the exclusion of another. . .*

Rust, 500 U.S. at 192-193 (emphasis added) (citations omitted).

Rust makes clear that the government's decision to selectively subsidize activities within a program it creates is *not* unlawful viewpoint discrimination. In *Rust*, Congress subsidized certain family planning speech but refused to subsidized family planning speech relating to abortion. Here, Congress will pay for certain legal services for the indigent but not for others. And, more recently, in *Finley* this Court reiterated that under *Rust*, subsidization of speech in government programs is not governed by the same rules as direct regulation of speech and does not constitute unlawful viewpoint discrimination. *See also TWR*, 461 U.S. at 549 ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right") and *Harris v. McRae*, 448 U.S. 297, 317, n.19 (1980) ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity.")

Moreover, the restrictions here, even if they were to be considered viewpoint-based (which as the Second Circuit held, they are not), they are far less viewpoint-skewed than the rule approved in *Rust*. Unlike doctors in *Rust*, there is no gag-rule on LSC-funded lawyers. They can advise persons seeking legal advice that the services these persons need are outside the scope of the LSC program. They can also refer these persons to lawyers who can provide the services in question. The rules this Court approved in *Rust*, on the other hand, prevented women from getting similar information about their constitutional right to an abortion, and left them less informed (or even misinformed) about their rights than prospective clients here. Under *Rust*, the restrictions in the 1996 Act are constitutional.

C. The Court of Appeals Correctly Rejected The Argument That The Program Integrity Rules Impermissibly Burden The Exercise Of Constitutional Rights

Even assuming any constitutional rights were implicated, Petitioners' facial challenge to the 1996 Act was nevertheless properly rejected. As the court of appeals observed, this Court's trilogy of decisions in *TWR, League of Women Voters* and *Rust* makes clear that "in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." App. 20a. As the court of appeals correctly concluded, the program integrity regulations promulgated by LSC provide such adequate alternative channels.

Petitioners seek to avoid the holdings of these cases by arguing that the program-integrity regulations are "wasteful" and expensive. Given the procedural context of this case—Petitioners brought a facial challenge to the 1996 Act—there is no record whatsoever to support Petitioners' contention. As the court of appeals correctly concluded in rejecting this argument:

> We find that plaintiffs' allegations are insufficient to sustain a facial challenge. We are unable to assess these contentions [of undue burden] on the sparse record before us, and we need not assess them to decide this appeal. . . . [P]laintiffs present little evidence to support their predictions regarding how seriously the 1996 Act will affect grantees generally, and they provide no basis for concluding that the program integrity rules cannot be applied in at least some cases without unduly interfering with grantees' First Amendment freedoms. It appears likely that LSC grantees with substantial nonfederal funding can provide the full range of restricted activity through separately incorporated affiliates without serious difficulty. Plaintiffs have therefore failed to

"establish that no set of circumstances exists under which the Act would be valid," and so their facial challenge must be rejected.

App. 23a-24a (citing *Rust*) (emphasis added).[10]

In short, in light of the facial nature of Petitioners' challenge, the court of appeals correctly rejected their wholly unsubstantiated attack on the alleged burdensome nature of the alternative channels of expression provided by the LSC program integrity regulations.[11]

D. The Court of Appeals Correctly Held That LSC's Regulations Are Entitled To Chevron Deference

Finally, the court of appeals correctly held that LSC is entitled to the full measure of deference under this Court's ruling

---

[10] Indeed, even if the program-integrity rules imposed some financial burden on the full exercise of any constitutional rights that might be at stake, they would still be valid. *See TWR*, 461 U.S. at 550 ("Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.' ") (*quoting Harris*, 448 U.S. at 318 (holding that economic impossibility of obtaining an abortion does not obligate government to fund the right or forego imposing threshold medical requirements to ensure that funds are spent for approved purposes).

[11] Petitioners also take issue with the district court's conclusion that Congress has a legitimate interest in avoiding the public perception that LSC funds are being used to support activities that Congress has chosen not to fund and that the separation requirements imposed by LSC are required to protect this interest, particularly given that the activities of LSC grantees assume numerous forms and take place in multiple settings. App. 95a-96a. The cases that Petitioners cite for the proposition that this "endorsement" rationale is insufficient to justify the restrictions are inapposite because they do not deal with government financial subsidies and do not deal with activities taking place in multiple settings. *See, e.g., Turner Broadcasting Co. v. Federal Communications Comm'n*, 512 U.S. 622 (1994) (private party's concern about not appearing to endorse particular point-of-view that was expressed in *one* setting could be addressed through disclaimer).

in *Chevron USA Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984) and rejected Petitioners' statutory attack on the validity of the program-integrity regulations.

The court's holding was consistent with the only other appellate court to have addressed this issue. Thus, in *Texas Rural Legal Aid*, 940 F.2d at 690, the court of appeals for the District of Columbia held that LSC is entitled to "the full measure of interpretive authority under [LSC] Act contemplated by *Chevron*." Indeed, Petitioners offer no authority whatsoever to support their claim for a different, more exacting standard, to apply.[12] There is no basis to review the court's ruling on this point.[13]

---

[12] The cases Petitioners cite (*Regional Management Corp. v. Legal Services Corp.*, 186 F.3d 457, 1999 WL 547925 (4th Cir., July 28, 1999) and *Spokane County Legal Services v. Legal Services Corp.*, 614 F.2d 662 (9th Cir. 1980)) do not address this issue. Rather, they simply held that LSC is not subject to the Administrative Procedure Act ("APA"). That this finding is not inconsistent with according LSC rulemaking *Chevron* deference is evident from the fact that in *Texas Rural Legal Aid*, the D.C. Circuit held *both* that LSC was not subject to the APA *and* that LSC was entitled to *Chevron* deference.

[13] Petitioners also claim that this is "may be this Court's only opportunity" to review the issues raised in herein because the 1998 legislation includes a provision that debars an LSC recipient who sues LSC. Petition at 29-30. In fact, while the statute provides that LSC "may" invoke this sanction (App. 142a), LSC, pursuant to rulemaking authority contained in the statute (*id.*) issued rules providing that the debarment provision shall not apply to constitutional challenges to LSC actions. 61 Fed. Reg. 64636 at 64640 and 64643-44 (Nov. 23, 1998) (to be codified at 45 C.F.R. § 1606.4(b)(5)(iii)).

CONCLUSION

The issues raised in this petition are not novel. They do not present any conflict with prior rulings of this Court. They do not present any conflict with the decisions of other circuit courts of appeal. In short, there is no reason for this Court to grant the petition. The petition for a writ of certiorari should be denied.

Dated: New York, New York
November 6, 1999

Respectfully submitted,

/s/ ALAN LEVINE
ALAN LEVINE
Counsel of Record
STEPHEN A. WIEDER
STEPHEN L. ASCHER
KRONISH LIEB WEINER
& HELLMAN LLP
1114 Avenue of the Americas
New York, New York 10036
(212) 479-6000

Counsel for Respondent
Legal Services Corporation

(3)

Supreme Court, U.S.
FILED
DEC 8 1999

No. 99-604

In the Supreme Court of the United States

CARMEN VELAZQUEZ, ET AL., PETITIONERS

v.

LEGAL SERVICES CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
BARBARA L. HERWIG
MATTHEW M. COLLETTE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

31pp

QUESTION PRESENTED

Congress, through a series of appropriations acts, has placed certain restrictions on the activities of entities that receive federal funds from the Legal Services Corporation (LSC). The question presented is:

Whether the statutory provisions, as implemented by the LSC in regulations that allow LSC fund recipients to create affiliate organizations that may use non-federal funds to engage in the restricted activities, violate the First Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	26

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 937 (1984)	25, 26
Edward J. DeBartolo Corp. v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988)	26
FCC v. *League of Women Voters*, 468 U.S. 364 (1984)	14, 15
Legal Aid Society of Hawaii v. *Legal Servs. Corp.*, 145 F.3d 1017 (9th Cir.), cert. denied, 119 S. Ct. 539 (1998)	11, 12, 13, 14, 17, 21
National Endowment for the Arts v. *Finley*, 524 U.S. 569 (1998)	20
Regan v. *Taxation with Representation*, 461 U.S. 540 (1983)	14, 15, 17
Rosenberg v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995)	13, 20, 21
Rust v. *Sullivan*, 500 U.S. 173 (1991)	*passim*
Texas Rural Legal Aid, Inc. v. *Legal Servs. Corp.*, 940 F.2d 685 (D.C. Cir. 1991)	25

Constitution, statutes and regulations:

U.S. Const.:	
Art. I, § 9, Cl. 7	14
Amend. I	*passim*

Statutes and regulations—Continued: Page

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 502, 111 Stat. 2510 3
Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (42 U.S.C. 2996 *et seq.*) 2
42 U.S.C. 2996(6) 5
42 U.S.C. 2996b(a) 2
42 U.S.C. 2996e 19
42 U.S.C. 2996e(a) 2
42 U.S.C. 2996e(a)(1)(A) 2
42 U.S.C. 2996e(b)(3) 5
42 U.S.C. 2996e(d)(3) 2-3
42 U.S.C. 2996e(d)(4) 3
42 U.S.C. 2996e(d)(5) 3
42 U.S.C. 2996f(a)(5) 3
42 U.S.C. 2996f(b) 19
42 U.S.C. 2996f(b)(8)-(10) 3
42 U.S.C. 2996i(c) 3
Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009:
§ 502(a), 110 Stat. 3009-59 3
§ 502(a)(2)(C), 110 Stat. 3009-60 5
Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 411, 112 Stat. 2681-107 3-4
Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321-53 3
§ 504(a)(1), 110 Stat. 1321-53 5
§ 504(a)(2), 110 Stat. 1321-53 5
§ 504(a)(3), 110 Stat. 1321-53 5
§ 504(a)(4), 110 Stat. 1321-53 5
§ 504(a)(7), 110 Stat. 1321-53 5
§ 504(a)(11), 110 Stat. 1321-53 5
§ 504(a)(12), 110 Stat. 1321-53 5
§ 504(a)(13), 110 Stat. 1321-53 5
§ 504(a)(14), 110 Stat. 1321-53 5

Statutes and regulations—Continued: Page

§ 504(a)(15), 110 Stat. 1321-53 5
§ 504(a)(16), 110 Stat. 1321-53 5
§ 504(a)(17), 110 Stat. 1321-53 5
§ 504(b), 110 Stat. 1321-56 5
§ 504(d)(1), 110 Stat. 1321-56 5
§ 504(d)(2), 110 Stat. 1321-56 5
§ 504(e), 110 Stat. 1321-57 5
28 U.S.C. 2403(a) 8
42 C.F.R. 59.9 17
45 C.F.R.:
Section 1610.7 7
Section 1610.8 17
Section 1610.8(a) 7
Section 1610.8(a)(1)-(3) 7
Section 1610.8(a)(3)(i)-(iv) 7

Miscellaneous:

119 Cong. Rec. 20,688 (1973) 2
142 Cong. Rec. H8189 (daily ed. July 23, 1996) 2
50 Fed. Reg. 49,279 (1985) 6
61 Fed. Reg. (1996):
p. 41,960 6
p. 63,749 6
p. 63,752 6
62 Fed. Reg. (1997):
pp. 12,101-12,104 7
p. 12,102 6
p. 27,695 7
pp. 27,696-27,697 8

In the Supreme Court of the United States

No. 99-604

CARMEN VELAZQUEZ, ET AL., PETITIONERS

v.

LEGAL SERVICES CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 164 F.3d 757. The memorandum and order of the district court (Pet. App. 53a-103a) are reported at 985 F. Supp. 323.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1999. A petition for rehearing was denied on July 8, 1999 (Pet. App. 104a-105a). The petition for a writ of certiorari was filed on October 6, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1974, Congress enacted the Legal Services Corporation Act (the LSC Act), Pub. L. No. 93-355, 88 Stat. 378 (42 U.S.C. 2996, *et seq.*), which created the Legal Services Corporation (LSC) as an independent, non-profit corporation to "provide financial assistance to qualified programs furnishing legal assistance to eligible clients." 42 U.S.C. 2996e(a)(1)(A). The LSC Act authorizes the LSC to make grants to, and to contract with, individuals, organizations and (in certain limited circumstances) state and local governments, for the purpose of providing legal assistance to eligible clients. *Ibid.* The LSC receives funds appropriated annually by Congress to provide such financial assistance. The LSC then distributes those funds to programs, individuals, and other entities that submit applications describing their proposed legal services activities. 42 U.S.C. 2996b(a), 2996e(a).

The LSC Act limits LSC financial support to "legal assistance in noncriminal proceedings or matters" for "persons financially unable to afford legal assistance." 42 U.S.C. 2996b(a). The LSC program was designed to target the "day-to-day" legal problems of the poor. 119 Cong. Rec. 20,688 (1973) (statement of Rep. Biester); see also 142 Cong. Rec. H8189 (daily ed. July 23, 1996) (statement of Rep. Torkildson) (the Act's primary focus is on "bread-and-butter services" to the poor).

Recipients of LSC funds have long been subject to restrictions to ensure the focus on basic legal services. The LSC Act has, from the outset, prohibited LSC fund recipients from, *inter alia*, making available any LSC funds, program personnel, or equipment to any political party, to any political campaign, or for use in "advocating or opposing any ballot measures." 42 U.S.C.

2996e(d)(3) and (4). The LSC Act has also prohibited LSC funds from being used to influence any governmental agency action or legislation, except upon request or when necessary to represent an eligible client. 42 U.S.C. 2996f(a)(5). And the Act has prohibited LSC funds from being used to provide legal assistance with regard to any proceeding relating to any nontherapeutic abortion, elementary or secondary school desegregation, military desertion, or violation of the selective service laws. 42 U.S.C. 2996f(b)(8)-(10). Finally, the LSC Act has, from the outset, prohibited LSC fund recipients from bringing any class action suits directly, or through others, unless express approval is obtained from the LSC fund recipient's project director according to established policies. 42 U.S.C. 2996e(d)(5). The LSC Act restrictions apply to LSC fund recipients' activities funded by LSC funds as well as by other nonpublic and nontribal funds. 42 U.S.C. 2996i(c).

b. In 1996, at a time when proposals were before Congress to eliminate the LSC altogether because of controversy over certain activities pursued by some LSC fund recipients, Congress enacted compromise legislation that expanded the scope of restrictions on the activities of LSC fund recipients. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321-53 (1996 Act). Congress carried forward the restrictions again in the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 502(a), 110 Stat. 3009-59 (1997 Act), and has continued the restrictions in subsequent legislation. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 502, 111 Stat. 2510; Omnibus Consolidated and Emergency

Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 411, 112 Stat. 2681-107.

Under those appropriations acts, LSC fund recipients are precluded from representing certain parties in specified circumstances. LSC fund recipients may not: advocate or oppose any reapportionment of a legislative, judicial, or elective district, or participate in any litigation related thereto; attempt to influence the "issuance, amendment, or revocation of any executive order, regulation" or similar government promulgation; attempt "to influence any part of any adjudicatory proceeding of any Federal, State, or local agency" that is formulating general agency policy; attempt to influence "the passage or defeat of any legislation, constitutional amendment, referendum, initiative * * * of the Congress or a State or local legislative body"; initiate or participate in class-action lawsuits; represent aliens who are unlawfully present in the United States except in cases of domestic violence; conduct a training program "for the purpose of advocating a particular public policy or encouraging a political activity"; claim or collect attorneys' fees; participate "in any litigation with respect to abortion"; "participat[e] in any litigation on behalf of a person incarcerated in a Federal, State, or local prison"; participate in "litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system," except that representation is allowed of an individual client "seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation"; or defend a person in a proceeding to evict the person from a public housing project if the person has been charged with engaging in illegal drug activity that threatens the health or safety of a tenant or employee

of the housing agency. 1996 Act, § 504(a)(1), (2), (3), (4), (7), (11), (12), (13), (14), (15), (16) and (17), 110 Stat. 1321-53 to 1321-56; 1997 Act, § 502(a)(2)(C), 110 Stat. 3009-60.[1]

The restrictions apply to the use by LSC fund recipients of funds received both from the LSC and from state or local governments or private donors. 1996 Act, § 504(d)(1) and (2), 110 Stat. 1321-56. LSC fund recipients must notify non-federal donors "that the funds may not be expended for any purpose prohibited" by the Act. 1996 Act, § 504(d)(1), 110 Stat. 1321-56.[2]

---

[1] The restrictions do not preclude LSC fund recipients from using non-LSC funds "to comment on public rulemaking or to respond to a written request for information or testimony from a Federal, State or local agency, legislative body or committee," 1996 Act, § 504(e), 110 Stat. 1321-57, or "for the purposes of contacting, communicating with, or responding to a request from, a State or local government agency, a State or local legislative body or committee, or a member thereof, regarding funding for the recipient." 1996 Act, § 504(b), 110 Stat. 1321-56.

[2] The LSC Act has also provided since 1974 that "attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession." 42 U.S.C. 2996(6); see also 42 U.S.C. 2996e(b)(3) (LSC "shall not, under any provision of this subchapter, interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility of the American Bar Association * * * or abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction. The Corporation shall ensure that activities under this subchapter are carried out in a manner consistent with attorneys' professional responsibilities.").

c. Shortly after passage of the 1996 Act, the LSC published regulations implementing the new statutory restrictions. See 61 Fed. Reg. 41,960 (1996); *id.* at 63,749. Coupled with pre-existing guidelines, the regulations applied the new restrictions not only to LSC fund recipients but also to any "interreleated" organization, defined as an organization as to which the LSC fund recipient determined "the direction of management and policies" or influenced them "to the extent an arm's length transaction may not be achieved." See 50 Fed. Reg. 49,279 (1985).[3]

2. a. On January 14, 1997, petitioners, who are lawyers employed by LSC fund recipients, their indigent clients, and various contributors to LSC fund recipients, brought this suit in the United States District Court for the Eastern District of New York against the Legal Services Corporation and Legal Services of New York. Petitioners alleged that the restrictions on the use by LSC fund recipients of federal and non-federal funds violate a variety of federal constitutional provisions.

b. On March 14, 1997, the LSC announced its intention to amend its regulations to allow LSC fund recipients "to have an affiliation or relationship with separate organizations which may engage in prohibited activities funded solely with non-LSC funds," 62 Fed. Reg. 12,102 (1997), in the same manner as was approved for separate projects in *Rust* v. *Sullivan*, 500 U.S. 173 (1991),

---

[3] The regulations also applied the restrictions to any entity that received a transfer of funds from an LSC fund recipient. 61 Fed Reg. at 63,752. If the funds transferred to the entity were LSC funds, the restrictions applied to all of the transferee entity's activities; if an LSC fund recipient transferred non-LSC funds, the restrictions applied only to the transferred funds. *Ibid.*

and it issued interim regulations addressing that issue. 62 Fed. Reg. at 12,101 to 12,104. LSC issued final regulations on May 21, 1997. 62 Fed. Reg. at 27,695.

Under the final regulations, an LSC fund recipient may create an affiliate that may spend non-federal funds on activities in which the LSC fund recipient itself may not engage ("restricted activities"), so long as the LSC fund recipient maintains its "objective integrity and independence" from the affiliate. 45 C.F.R. 1610.8(a). An LSC fund recipient "will be found to have objective integrity and independence" from an affiliate if: (1) the affiliated organization is a "legally separate" organization; (2) the affiliate "receives no transfer of LSC funds, and LSC funds do not subsidize restricted activities"; and (3) the LSC fund recipient is "physically and financially separate" from the affiliate. *Id.* § 1610.8(a)(1)-(3). Satisfaction of the third criterion is to be determined on a case-by-case basis according to the "totality of the facts," including, but not limited to: "(i) "[t]he existence of separate personnel; (ii) [t]he existence of separate accounting and timekeeping records; (iii) [t]he degree of separation from facilities in which the restricted activities occur, and the extent of such restricted activities; and (iv) [t]he extent to which signs and other forms of identification which distinguish the [LSC fund] recipient from the [affiliated] organization are present." *Id.* § 1610.8(a)(3)(i)-(iv).[4]

---

[4] The new regulations also amended the rule governing the transfer of funds to provide that the restrictions apply only when an LSC recipient transfers LSC funds to another person or entity. When a person or entity receives LSC funds from an LSC fund recipient, that person or entity is subject to the restrictions with respect both to its LSC and its non-LSC funds. 45 C.F.R. 1610.7. However, a person or entity that receives *non*-LSC funds from an

c. On March 14, 1997, the United States intervened in the district court proceedings, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the restrictions.

3. On March 21, 1997, petitioners sought a preliminary injunction against enforcement of the restrictions to the extent they prevent LSC fund recipients from using non-federal funds to engage in certain activities. The district court denied the preliminary injunction, Pet. App. 53a-103a, concluding that petitioners had failed to establish a probability of success on the merits.

The court first held that the LSC's regulations requiring separation between LSC fund recipients and their affiliates are consistent with the statutory funding restrictions. Pet. App. 87a-92a. The court also held that the LSC's program-integrity requirements are appropriately tailored to serve the government's interest in preventing the appearance that the government is endorsing activities that Congress does not wish to fund. *Id.* at 92a-96a.

The district court rejected petitioners' contention that the LSC program integrity requirements, while "embraced by the Court in *Rust* [v. *Sullivan*, 500 U.S. 173 (1991)]" (Pet. App. 92a), are different when applied to lawyer-client relationships. The court rejected petitioners' argument that the affiliate rules accepted in *Rust* do not provide the appropriate benchmark here because, petitioners contend, the LSC regulations "strike at the heart of activities that are laden with First Amendment value." *Id.* at 99a. The court found that, while the lawyer-client relationship implicates First Amendment values, "the restrictions pertaining

---

LSC fund recipient is not subject to the restrictions. See 62 Fed. Reg. at 27,696 to 27,697.

to LSC recipients do not significantly impinge on the lawyer-client relationship," especially when contrasted with the "proactive aspects" of Title X of the Public Health Service Act, involved in *Rust*. *Id.* at 101a. In fact, the court noted that the LSC regulations "broadly promote the lawyer-client relationship by providing that the lawyer may counsel the client, refer the client to another attorney, and explain to the client that LSC restrictions preclude the lawyer from engaging in the activity the client may wish to undertake." *Id.* at 102a.[5]

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-52a.

a. The court held that the LSC's regulations are based on a reasonable interpretation of the relevant statutory provisions, Pet. App. 13a-15a, and that the prohibition against furnishing LSC funds to entities that engage in certain activities does not unconstitutionally encroach on the relationship between lawyer and client, *id.* at 15a-18a. The court reasoned that, even assuming "that an 'all-encompassing' lawyer-client relationship enjoys heightened protection from government regulation, the lawyer-client relationships funded by LSC are no more 'all-encompassing' than the doctor-patient relationships funded under Title X, which were considered in *Rust*." *Id.* at 16a-17a.

---

[5] The district court rejected petitioners' "rather casual due process and equal protection claims." Pet. App. 102a. The due process claim failed "for the same reasons the analogous claim failed in *Rust*—namely, because plaintiffs are not absolutely precluded from engaging in prohibited activities and, furthermore, have no constitutional entitlement to the benefits provided by the legal services program." *Ibid.* The equal protection argument failed because "the Government had a rational basis for restricting the activities of recipients, and because poverty is not a suspect classification." *Ibid.*

The court also rejected petitioners' facial challenge to the adequacy of the program-integrity rules contained in the regulations which allow LSC fund recipients to establish affiliate organizations that can then use non-federal funds to engage in activities that are foreclosed to the recipients themselves. Pet. App. 18a-24a. The court rejected petitioners' argument (*id.* at 18a) that the restrictions create "unconstitutional conditions" by unreasonably burdening LSC fund recipients' use of non-federal funds to engage in activities protected by the First Amendment. The court noted that petitioners "provide no basis for concluding that the program integrity rules cannot be applied in at least some cases without unduly interfering with grantees' First Amendment freedoms." *Id.* at 24a. In particular, the court found that the existence of adequate alternative avenues for engaging in restricted activities through affiliates is sufficient to satisfy First Amendment scrutiny. *Id.* at 20a-24a.

The court of appeals next rejected petitioners' claims of viewpoint discrimination with respect to the general restrictions on lobbying and attempting to influence a rulemaking proceeding. Pet. App. 24a-26a. It held that the classifications established by the provisions are "based on subject matter, not viewpoint." *Id.* at 25a. The restrictions do not suppress ideas, the court reasoned, but rather merely prohibit fund recipients from engaging in activities outside the scope of the program. *Id.* at 26a.

The court also upheld the general prohibitions against lobbying, rulemaking, and participating in litigation "involving an effort to reform a Federal or State welfare system," Pet. App. 26a-27a, and the prohibition against "initiat[ing] legal representation . . . involving an effort to reform a . . . welfare system," *id.* at 27a-

28a. The court reasoned that those provisions are viewpoint neutral because they prohibit activity that either supports or opposes welfare reform. *Ibid.*

The court reversed, however, with regard to one aspect of the restrictions related to welfare reform—the provision that creates an exception to those restrictions by permitting representation of a client seeking specific relief from a welfare agency "if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." Pet. App. 29a. The court held that the exception permitting only certain representations of clients seeking relief from a welfare agency constitutes viewpoint discrimination subject to strict First Amendment scrutiny, and the court perceived no reason why that provision survived strict scrutiny. *Id.* at 29a-36a. The court of appeals directed the district court to enter a preliminary injunction barring enforcement of the restriction on seek specific relief. *Id.* at 36a-39a.

b. Judge Jacobs filed a separate opinion, concurring in the majority's rulings upholding most of the statutory provisions, but dissenting from the ruling striking down the one welfare-related provision as unconstitutional viewpoint discrimination. Pet. App. 40a-52a. He specifically pointed to the Ninth Circuit's decision in *Legal Aid Society of Hawaii* v. *Legal Services Corporation*, 145 F.3d 1017, cert. denied, 119 S. Ct. 539 (1998) (White, J., sitting by designation), which rejected similar challenges to the LSC restrictions. Pet. App. 49a.

ARGUMENT

The court of appeals correctly upheld, against a facial challenge under the First Amendment, most of the restrictions on activities by entities that receive Legal Services Corporation (LSC) funds, as well as the

program-integrity regulations that require an LSC fund recipient to establish a separate affiliate that receives non-federal funds to engage in activities that are foreclosed to the recipient itself. Those rulings were based on a straightforward application of this Court's precedents and do not conflict with any decision of any other court of appeals. Review of those issues by this Court therefore is not warranted.[6]

1. a. The Ninth Circuit recently rejected a similar facial challenge to the LSC restrictions, and this Court declined to review that ruling. See *Legal Aid Society of Hawaii* v. *Legal Serv. Corp.*, 145 F.3d 1017 (9th Cir.), cert. denied, 119 S. Ct. 539 (1998) (*LASH*). There is no reason for a different disposition here.

In an opinion by retired Associate Justice White, sitting by designation, the Ninth Circuit in *LASH* held that the challenged restrictions on activities of LSC fund recipients do not violate the First Amendment.

---

[6] As noted above (see p. 11, *supra*), the court of appeals held unconstitutional the provisions in the annual appropriation acts that create an exception to the restrictions related to welfare reform; that exception permits representation of a client seeking specific relief from a welfare agency "if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation." Pet. App. 29a. The court of appeals concluded that the quoted proviso to the exception constitutes impermissible viewpoint discrimination. On December 6, 1999, we filed a petition for a writ of certiorari seeking this Court's review of that aspect of the decision below. *United States* v. *Velazquez*, No. 99-960. For the reasons stated in our certiorari petition, that holding is erroneous and warrants review by this Court. By contrast, the aspects of the Second Circuit's decision sustaining the LSC program-integrity regulations and the other provisions petitioners challenge here are correct, are supported by this Court's decisions and the Ninth Circuit's decision in *LASH*, and do not warrant review.

Id. at 1024-1029. The court noted that the LSC regulations requiring a "distinction between restricted and unrestricted organizations are nearly identical to the regulations upheld in *Rust* and there is no basis for distinguishing this case from *Rust*." *Id.* at 1024. Thus, the Ninth Circuit explained, "the Court's discussion in *Rust* of why the Secretary's regulations were constitutional control[led] the disposition of [the Ninth Circuit's] case." *Id.* at 1025. As in *Rust*, the Ninth Circuit reasoned, the government is not denying a benefit to anyone on the basis of First Amendment activity, but is "instead simply insisting that public funds be spent for the purposes for which they were authorized." *Ibid.* (quoting *Rust*, 500 U.S. at 196). Moreover, the court continued, LSC recipients are not being required to give up the specified activities, but are merely being required to keep such activities separate from LSC-funded functions by conducting them "through entities that are separate and independent" from the LSC recipient. *Ibid.*

The Ninth Circuit also rejected the contention that *Rosenberger* v. *Rector & Visitors of Univ. of Virginia.*, 515 U.S. 819, 833 (1995), renders the challenged restrictions unconstitutional. It reasoned that, unlike in *Rosenberger*, where the government expended funds to encourage a diversity of views from private speakers, "the LSC program is designed to provide professional services of limited scope to indigent persons, not [to] create a forum for the free expression of ideas." *LASH*, 145 F.3d at 1028. The Ninth Circuit similarly rejected the contention that the restrictions should be evaluated under a compelling-interest standard, pointing out that a recipient voluntarily receives LSC funding and consents to the restrictions, that the recipient remains free to engage in the activities at issue through a separate

entity, and that *Rust* did not apply such a standard. *Id.* at 1028-1029. The Second Circuit's decision in this case, sustaining the program-integrity regulations and the general thrust of the statutory restrictions on LSC fund recipients thus is consistent with the Ninth Circuit's decision in *LASH*.

b. The court of appeals' decision also is fully consistent with this Court's precedents, which confirm the validity of the LSC's program-integrity regulations requiring that restricted activities may be conducted with non-LSC funds only through an independent affiliate. Congress has broad power to specify the purposes for which funds appropriated out of the Federal Treasury may be spent. See U.S. Const. Art. I, § 9, Cl.7. It is well settled that Congress, in exercising that power, may provide that federal funds are not to be used to support particular activities that also are supported by non-federal funds—even if the activities involved are of the sort that are fully protected by the First Amendment when engaged in solely by private parties—so long as the fund recipient is allowed to form an affiliate organization to receive and spend non-federal funds to engage in those activities. See, *e.g.*, *FCC* v. *League of Women Voters*, 468 U.S. 364, 400 (1984). Congress may require that such an affiliate organization be kept "physically and financially separate" from the organization that receives federal funds. *Rust* v. *Sullivan*, 500 U.S. 173, 180, 187-190 (1991).

This Court has, on several occasions, rejected contrary arguments akin to those pressed by petitioners here. In *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983), the Court rejected a challenge to Section 501(c)(3) of the Internal Revenue Code, which forbids tax-exempt organizations from engaging in lobbying. The Court held that the restriction on lobbying did

not place an unconstitutional condition on the receipt of a tax benefit, noting that the organization could create a separate affiliate to engage in lobbying activity. *Id.* at 544-545. The Court explained that "[t]he IRS apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying. This is not unduly burdensome." *Id.* at 545 n.6.

In *League of Women Voters*, 468 U.S. at 381-402, the Court struck down a statutory provision that prohibited federally subsidized stations from broadcasting editorial opinions, in part because a station "is not able to segregate its activities according to the source of its funding" and has "no way of limiting the use of its federal funds to all noneditorializing activities." *Id.* at 400. The Court recognized, however, that "if Congress were to adopt a revised version of [the statute] that permitted noncommercial educational broadcasting stations to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism would plainly be valid." *Ibid.* Under such a statute, a station "would be free, in the same way that the charitable organization in *Taxation with Representation* was free, to make known its views on matters of public importance through its nonfederally funded, editorializing affiliate without losing federal grants for its noneditorializing broadcast activities." *Ibid.*

In *Rust*, the Court sustained regulations implementing Title X of the Public Health Service Act that prohibited the use of federal funds "in programs where abortion is a method of family planning." 500 U.S. at 178. The regulations prohibited Title X projects from, among other things, counseling patients regarding

abortion, referring patients to abortion providers, lobbying for legislation to increase the availability of abortion, and using legal action to make abortion available. See *id.* at 180. The regulations also required that Title X projects be organized so that they were "physically and financially separate" from prohibited abortion-related activities. Under that provision, the federally funded project was required to have "objective integrity and independence" from prohibited activities, beyond mere bookkeeping separation. *Id.* at 180-181. The Court held that the regulations did not violate the First Amendment because, "[b]y requiring that the Title X grantee engage in abortion-related activity separately from activity receiving federal funding, Congress has, consistent with [the Court's] teachings in *League of Women Voters* and *Regan* [v. *Taxation with Representation*], not denied it the right to engage in abortion-related activities." *Id.* at 198. Rather, "Congress has merely refused to fund such activities out of the public fisc, and the Secretary has simply required a certain degree of separation from the Title X project in order to ensure the integrity of the federally funded program." *Ibid.*

The LSC restrictions at issue here are fully consistent with *Taxation with Representation*, *League of Women Voters* and *Rust*. The statutory restrictions, as implemented by the LSC in its final regulations, allow LSC fund recipients to create and control affiliates that use non-LSC funds to provide legal services that are foreclosed to the LSC fund recipients themselves. As noted by the courts below, the challenged regulations are substantially the same as those upheld in *Rust*. See Pet. App. 20a (discussing similarities in the two sets of regulations); *id.* at 77a-79a (same). Like the *Rust* regulations, the LSC regulations require "physical and

financial separation" as part of a requirement that the LSC fund recipient and its affiliate maintain "objective integrity and independence." Compare 45 C.F.R. 1610.8 with 42 C.F.R. 59.9. Sufficient physical and financial separation under the LSC program is determined on a case-by-case basis using the same factors identified in the *Rust* regulations: the existence of "separate personnel," "separate accounting and timekeeping records," "the degree of separation from facilities in which restricted activities occur," and the presence of "forms of identification which distinguish the recipient" from the affiliate. Compare 45 C.F.R. 1610.8 with 42 C.F.R. 59.9.

Indeed, in some respects, the LSC restrictions are more permissive than those at issue in *Rust*, because the latter contained a rule that prevented physicians from referring a patient to an abortion provider or even mentioning abortion as a method of family planning. See 500 U.S. at 180. The LSC regulations contain no comparable restrictions. LSC fund recipients are free to discuss with their clients other options (including activities in which the LSC recipient may not engage) and to refer clients to organizations that provide restricted services (including any affiliate organization the LSC fund recipient may create under the program-integrity regulations). The one requirement in the LSC regulations that was not in the *Rust* regulations—that an LSC fund recipient and its affiliate organization be "legally" separate entities (45 C.F.R. 1610.8(a)(1))—does not alter the analysis, because such a requirement was held by this Court in *Taxation with Representation* not to constitute an undue burden. 461 U.S. at 544- 545 n.6; see *LASH*, 145 F.3d at 1027-1028.

The LSC regulations thus allow for adequate alternative channels for petitioners to engage in activities

protected by the First Amendment. If an LSC fund recipient avails itself of the affiliate structure, its ability to use non-federal contributions is subject to restrictions only if the donor makes a specific choice to give the money to the LSC fund recipient rather than its non-LSC affiliate, after receiving written notification that that choice would make the contribution subject to the same restrictions as federal funds. That consequence raises no substantial First Amendment issue. The affiliate regulations therefore are constitutional under *Taxation with Representation, League of Women Voters* and *Rust*.

2. a. Petitioners contend (Pet. 17-20) that certiorari is warranted to address the issue whether the LSC restrictions unconstitutionally interfere with the relationship between a government-funded attorney and his or her client. In doing so, petitioners rely primarily upon dicta in *Rust*, in which this Court suggested that "[i]t could be argued * * * that traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government." *Rust*, 500 U.S. at 200. The *Rust* Court went on to state that it "need not resolve that question here, however, because the Title X program regulations do not significantly impinge upon the doctor-patient relationship." *Ibid.*

The *Rust* Court identified two reasons why the regulations did not interfere with the doctor-patient relationship. Both apply with equal force here. First, the *Rust* Court noted that "[nothing in [the regulations] requires a doctor to represent as his own any opinion that he does not in fact hold." *Rust*, 500 U.S. at 200. That is unquestionably the case with respect to lawyers employed by LSC fund recipients.

Second, the *Rust* Court observed that "the doctor-patient relationship established by the Title X program" is not "sufficiently all-encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." *Rust*, 500 U.S. at 200. In those circumstances, the Court found, the "doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her. The doctor is always free to make clear that advice regarding abortion is simply beyond the scope of the program." *Ibid.* As the court of appeals recognized, "the lawyer-client relationships funded by LSC are no more 'all-encompassing' than the doctor-patient relationships funded under Title X, which were considered in *Rust*." Pet. App. 17a. As explained above, the LSC program covers "bread and butter" legal services and has been limited from its inception. See, *e.g.*, 42 U.S.C. 2996e, 2996f(b). Simply put, and contrary to petitioners' suggestion (Pet. 21-24), Congress never intended for LSC attorneys to provide comprehensive legal services to their clients; Congress intended for them to furnish the types of legal services that it believed best served the public interest.

Moreover, unlike the doctors in *Rust*, who were subject to a rule that prohibited them from even counseling patients about receiving an abortion elsewhere, attorneys employed by LSC fund recipients remain free to inform their clients that certain litigation or other legal representation is beyond the scope of their representation and to refer any clients to any organization, including any affiliate, that can handle such legal representation. Indeed, unlike in *Rust*, there are no restraints on the advice that may be provided concerning the need for those services and their availability elsewhere.

Because attorneys employed by LSC fund recipients may furnish such advice as an alternative to entering into a full attorney-client relationship with respect to a particular problem confronting a client, the concerns identified by the Court in *Rust* concerning physicians in a counseling relationship do not even directly arise here. As in *Rust*, then, this Court need not determine the extent to which government regulations may interfere with an "all-encompassing" lawyer-client relationship, since the LSC regulations do not create such a relationship.

Petitioners attempt to distinguish *Rust* by arguing (Pet. 19- 20) that the Title X program in *Rust* was designed to convey a governmental message, while the LSC program is designed to encourage private speech in a manner akin to the program at issue in *Rosenberger* v. *Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833 (1995). But petitioners' attempted distinction of *Rust* does not hold up. In the first place, the counseling by doctors and other persons employed by family planning organizations that received Title X funds in *Rust* was not government speech. It was private, professional counseling rendered within the parameters of a federally assisted program. The same is true here.

By the same token, the program in *Rosenberger* was very different from the programs in *Rust* and here. It was designed to encourage diverse private expression, and the Court held that the University had, in effect, created a limited public forum for such private expression. 515 U.S. at 829-830; see *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 596 (1998); see also *id.* at 598-599 (Scalia, J., concurring in the judgment) (noting that *Rosenberger* "found the viewpoint discrimination unconstitutional, not because funding of 'private'

speech was involved, but because the government had established a limited public forum").

The LSC program, by contrast, does not create a public forum and is not dedicated to the promotion of diverse private expression in such a forum—it exists to subsidize certain discrete legal services and activities. As the Ninth Circuit correctly held, "the LSC program is designed to provide professional services of limited scope to indigent persons, not [to] create a forum for the free expression of ideas." *LASH*, 145 F.3d at 1028. Any limitations on expression by LSC fund recipients are but an incidental result of the program's restrictions on certain types of activities that the recipient may undertake on behalf of clients. Such an incidental limitation on the use of federal funds is "not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in *activities* outside of the project's scope." *Rust*, 500 U.S. at 194 (emphasis added). Cf. *Rosenberger*, 515 U.S. at 833 (recognizing that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes").

Furthermore, in *Rosenberger*, the University of Virginia provided funding to a wide array of student viewpoints, but then singled out religious expression as ineligible for funding. The LSC restrictions do not fund a broad array of private speakers (or lawyers) but then single out a disfavored viewpoint for a funding restriction. Instead, the LSC Act establishes a program that is narrow in scope to begin with, and the annual appropriations acts simply further narrow the scope of that program.

b. Petitioners' arguments with respect to viewpoint discrimination (Pet. 21-24) are without merit even on

their own terms. The restrictions concerning class actions, attorneys' fees, and attempting to influence the formulation of broad policy, which petitioners cite (Pet. 22), are neutral in their terms and do not draw distinctions among the activities of LSC fund recipients on the basis of viewpoint.

The sole basis for petitioners' claim of viewpoint discrimination is the fact that Congress has chosen to fund certain activities and not others. The petitioners in *Rust* made the same argument, and this Court rejected it. The program at issue in *Rust* provided for family planning counseling but expressly prohibited abortion counseling and referral. The petitioners in that case contended that the program discriminated on the basis of viewpoint because it allowed speech discussing some viewpoints (those favoring certain family planning options) while prohibiting competing viewpoints (those favoring abortion as a family planning option). See 500 U.S. at 192. The Court rejected that argument, holding that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other." *Id.* at 193. The Court concluded: "This is not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope." *Id.* at 194.

In addition, the *Rust* Court rejected the rationale that forms the central premise of petitioners' argument in this case. Thus, the Court observed:

> Petitioners' assertions ultimately boil down to the position that if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition. Within far broader limits than petitioners are willing to concede, when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.

Rust, 500 U.S. at 194 (citations omitted). The fact that the activity involved is protected by the First Amendment in other settings does not prevent the Government from declining to fund that activity if it is outside the scope of the program. *Id.* at 194-195 ("But we have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded.").

LSC fund recipients do not occupy a position different in any relevant respect from that of the doctors in *Rust*. Indeed, the doctors subject to the Title X regulations were prohibited from even stating their viewpoint with respect to the subject of abortion. See *Rust*, 500 U.S. at 180. Lawyers employed by LSC fund recipients, by contrast, are free to express their views regarding any legal matter—including matters subject to the LSC restrictions—and to refer persons to other organizations, including any affiliate, that will represent the persons in otherwise prohibited litigation. Congress thus has not sought to "suppress[] a dangerous

idea" or to "singl[e] out a disfavored group on the basis of speech content." See *id.* at 194. Rather, just as in *Rust*, Congress has simply declined to fund certain activities and provided for a degree of separation between an LSC fund recipient and an affiliate to safeguard the integrity of the federal program.

Accordingly, contrary to petitioners' assertion (Pet. 24), there is no occasion in this case to grant review in order to provide guidance as to when restrictions imposed in conjunction with funding government programs constitute impermissible viewpoint discrimination. This case falls within the teachings of *Rust*, and further review is unnecessary.

c. Petitioners also ask (Pet. 24-27) this Court to resolve the question of "when onerous requirements concerning the wasteful physical separation of government subsidized activities from non-government subsidized activities impermissibly burden the right to engage in First Amendment-protected activities with non-governmental funds." Pet. 24. That contention is based on the unsupported assertion that the LSC's physical separation requirement is so onerous that it has "proven virtually impossible to use." Pet. 24. Petitioners chose, however, to bring a *facial* challenge to the LSC restrictions. And, as the court of appeals recognized (Pet. App. 23a-24a), petitioners "present little evidence to support their predictions regarding how seriously the 1996 Act will affect grantees generally, and they provide no basis for concluding that the program integrity rules cannot be applied in at least some cases without unduly interfering with grantees' First Amendment freedoms." Petitioners' general allegations that compliance with the LSC regulations is burdensome are insufficient to support their facial challenge.

3. Petitioners suggest (Pet. 27-28) that further review is necessary to determine whether the LSC, as a federally chartered nonprofit corporation, is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in the interpretation of the LSC Act that is embodied in its program-integrity regulations. As the LSC points out in its brief in opposition (at 17-18), there is no conflict in the circuits on this issue, since the only other court of appeals that has addressed the issue has held that LSC regulations are entitled to deference under *Chevron*. See *Texas Rural Legal Aid, Inc.* v. *Legal Serv. Corp.*, 940 F.2d 685, 690 (D.C. Cir. 1991).[7]

In addition, petitioners' contention is particularly inappropriate for review in the circumstances of the present case. In attempting to eliminate *Chevron* deference, petitioners seek to reject the LSC's interpretation of the Act as allowing LSC fund recipients to create affiliates to engage in otherwise restricted activities, and to adopt an interpretation of the Act that makes it more burdensome and therefore, in petitioners' view, more constitutionally suspect. However, where two constructions of a statute are possible, it is a court's duty to interpret the statute in a way that avoids the very sort of constitutional doubt that

---

[7] The LSC also states in its brief in opposition (at 18 n.13) that petitioners err in claiming that this case may present the Court's only opportunity to address the First Amendment issues raised by Congress's restrictions. The LSC explains that the debarment provision on which petitioners rely allows, but does not require, the LSC to debar a recipient in certain circumstances and that the LSC has "issued rules providing that the debarment provision shall not apply to constitutional challenges to LSC actions." *Id.* at 18 n.13 (citing 61 Fed. Reg. at 64,636, 64,640, 64,643 to 64,644 (1998) (to be codified at 45 C.F.R. 1606.4(b)(5)(iii)).

petitioners' approach seeks to accentuate. See *Edward J. Debartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

Accordingly, resolution of the question whether deference is appropriate would make no difference to the outcome of this case. Deference under *Chevron* is appropriate where the statute is ambiguous. *Chevron*, 467 U.S. at 843. Yet if the statute is ambiguous, a court has a duty—even without resorting to *Chevron* deference—to interpret the statute to avoid creating the sort of constitutional infirmity that petitioners insist would be present without the program-integrity regulations. Thus, even if the Court did not apply *Chevron* deference to the LSC's interpretation of the Act it is charged with administering, the LSC's program-integrity regulations are valid.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
BARBARA L. HERWIG
MATTHEW M. COLLETTE
Attorneys

DECEMBER 1999